86-113

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN BAPTIST CHURCHES IN THE U.S.A., *et al.*,
Petitioners,

v.

RONALD W. REAGAN, as President of the United States of America, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

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QUESTIONS PRESENTED

In a case in which petitioners'* complaint challenging the constitutionality of the establishment of diplomatic relations between the United States and the Holy See was dismissed under Federal Rule of Civil Procedure 12(b)(6):

1. Are the alleged injuries of unequal treatment between denominations and stigmatization of petitioners' denominations sufficient to confer standing on petitioners in light of the lack of precedents in this area?

2. Are federal courts barred by the political question doctrine from deciding whether the establishment of diplomatic relations is with a church and not a territorial sovereignty and thus beyond the President's powers under Article II?

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*Petitioners include six national religious denominations, the American Baptist Churches in the U.S.A., the American Humanist Association, the Church of the Brethern, the Presbyterian Church (U.S.A.), the Progressive National Baptist Convention, and the Unitarian Universalist Association; and two national organizations of religious denominations, the National Association of Evangelicals and the National Council of the Churches of Christ in the U.S.A.

LIST OF PARTIES

The parties to the proceedings below were AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ROBERT L. MADDOX, Individually and as Executive Director of Americans United for Separation of Church and State; AMERICAN BAPTIST CHURCHES IN THE U.S.A.; ROBERT C. CAMPBELL, Individually and as General Secretary of the American Baptist Churches in the U.S.A.; AMERICAN COUNCIL OF CHRISTIAN CHURCHES OF CALIFORNIA; EDGAR R. KOONS, Individually and as President of the American Council of Christian Churches of California; AMERICAN HUMANIST ASSOCIATION; FREDERICK EDWORDS, Individually and as Executive Director of the American Humanist Association; CHURCH OF THE BRETHREN; ROBERT W. NEFF, Individually and as General Secretary of the Church of the Brethren; COUNCIL ON RELIGIOUS AND CIVIL LIBERTY; INSTITUTE OF WOMEN TODAY; THE NATIONAL ASSOCIATION OF EVANGELICALS; BILLY A. MELVIN, Individually and as Executive Director of the National Association of Evangelicals; NATIONAL ASSOCIATION OF LAITY; JOSEPH T. SKEHAN, Individually and as President of the National Association of Laity; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.; BISHOP PHILIP COUSIN, Individually and as President of the National Council of the Churches of Christ in the U.S.A.; THE NATIONAL COALITION OF AMERICAN NUNS; OHIO ASSOCIATION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; G. WEIR HARTMAN, Individually and as Executive Director of Ohio Association for Public Education and Religious Liberty; PRESBYTERIAN CHURCH (U.S.A.); PROGRESSIVE NATIONAL BAPTIST CONVENTION, INC; C.J. MALLOY, JR., Individually and as General Secretary of the Progressive National Baptist Convention, Inc.; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALISTS FOR RELIGIOUS FREEDOM; KEN GJEMRE, Individually and

as Chair of Unitarian Unitarian Universalists for Religious Freedom; HIGH WOODS REFORMED CHURCH; RIGHT REV. H. COLEMAN MCGEHEE, JR.; JAMES MANKIN; GARY M. BEAUCHAMP; GASTON D. COGDELL; P.D. WILMETH; J.P. SANDERS; JAMES J. BROWN; W.L. LUMPKIN; ROBERT D. HUGHES; ROBERT A. PARKER; ALTON H. MCEACHERN; E. MALLARY BINNS; JAMES A. LANGLEY; MALCOM G. LUNCEFORD; CHARLES H. ASHCRAFT; RUDY A. PULIDO; C. WELTON GADDY; IRA H. PEAK, JR.; JAMES LEO GARRETT, JR.; PAUL GRIFFIN JONES, II; LEON HYATT, JR.; PHIL DOWELL STRICKLAND; RABBI BALFOUR BRICKNER; LARRY L. LEWIS; BERNARD F. DIDIER; JAMES P. ARCHIBALD; WILLIAM V. WIIST; R. LEE KRETZ; MITCHELL A. TYNER; WILLIS ADAMS; EDWIN E.G. SHAFER; GORDON W. ZUTZ; EDD DOERR; DAVID D. VAN STRIEN; THEODORE A. WEBB; JAMES F. HORNBACK; DAVID M. HOWARD; L.J. PETERSON; RONALD B. FLOWERS; NORMAN J. BAUER; FRED SCHWENGEL; GLEN A. HOLMAN; AUGUSTA P. FINKELSTEIN; CAROLYN E. MORGAN; MARY LEE S. O'NEAL; MARY BETH BECK; WALTER B. PONTYNEN, JR.; JAMES C. WEYDERT; LYNN L. WEYDERT; MICKIE L. WEYDERT; BERNICE G. GEORGE; BARBARA MOON; WILBUR F. HERMANCE; FLORIDA S. ESCHENBACH; JEWEL E. MORRISON; STEWART M.L. POLLARD; WENDELL PHILLIPS BERWICK; C.R. DALEY; CHARLES H. SUMNER; LEA W. CLAYTON, JR.; ALBERT R. DILLEY; FRANCIS W. HENSLEY; ROBERT R. TILITZ; MARIO CUNIBERTI; JAMES T. MCCOLLUM; W.B. TICHENOR; CAROLINA C. CAPISTRANO; ALVIN W. STUART; JOHN V. STEVENS, SR.; HARRY F. MICHAELS; BAPTIST GENERAL ASSOCIATION OF VIRGINIA; ADVENTIST LAYMEN'S FOUNDATION OF ARKANSAS; ADVENTIST LAYMEN'S FOUNDATION OF MISSISSIPPI as appellants. These parties are the petitioners in this Court. The appellees below were RONALD

W. REAGAN, as President of the United States of America; UNITED STATES OF AMERICA; GEORGE P. SHULTZ, as Secretary of State; DEPARTMENT OF STATE; JAMES A. BAKER, III, as Secretary of the Treasury; DEPARTMENT OF THE TREASURY; and WILLIAM A. WILSON, as the United States Ambassador to the Holy See. These parties are respondents in this Court. William A. Wilson resigned as Ambassador to the Holy See effective July 17, 1986. Petitioners intend that any successor appointed to the vacancy be automatically substituted under Supreme Court Rule 40.3.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, American Baptist Churches in the U.S.A., et al.,[1] respectfully pray that a writ of certitorari issue to review the judgment, opinion and order denying rehearing of the United States Court of Appeals for the Third Circuit. The opinion and judgment of the court of appeals were entered in this case on March 21, 1986, and the petition for rehearing was denied on April 25, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 786 F.2d 194, 54 U.S.L.W. 2519 (3rd Cir. 1986) and is reprinted in the Appendix herein at 1a, *infra*.

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[1] Petitioners are listed in the List of Parties, *supra*.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (Fullam, J.P.) is reported at 607 F.Supp. 747 (E.D. Pa. 1985), and is reprinted in the Appendix herein at 21a, *infra*.

JURISDICTION

This is a civil action arising under the United States Constitution, and, therefore, jurisdiction for the filing of this action was invoked under 28 U.S.C. §§ 1331, 2201 and 2202. Petitioners brought this action in the Eastern District of Pennsylvania. On May 8, 1985, the district court granted respondents' motion to dismiss the First Amended Complaint with prejudice. *See* Appendix at 30a, *infra*.

On petitioners' appeal, the Third Circuit on March 21, 1986, affirmed the judgment appealed from (*see* Appendix at 19a, *infra*). A petition for rehearing was timely sought and denied by order of the court entered on April 25, 1986. *See* Appendix at 20a, *infra*.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

> Article II
>
> *Section 2*, dealing with the powers and duties of the President, in pertinent part states:
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: . . . .

Section 3, dealing with miscellaneous powers and duties of the President, in pertinent part states:

[H]e shall receive Ambassadors and other public Ministers. . . .

Article III

Section 2, dealing with the jurisdiction of the judicial department, in pertinent part states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another state;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Amendment I states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V in pertinent part states:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On January 10, 1984, the United States Department of State issued the following formal announcement:

> The United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States of America, and nunciature on the part of the *Holy See*, as of today, January 10, 1984. [emphasis supplied]

Never before had the United States in its over 200 year history ever entered into such a relationship with the Holy See, although it had had diplomatic relations with the papal states from 1848 until 1868.

President Reagan subsequently announced that he would nominate William A. Wilson as United States Ambassador to the Holy See. On March 7, 1984, the Senate confirmed that appointment. On March 26, 1984, Pope John Paul II named Archbishop Pio Laghi the first Apostolic Pro Nuncio to the United States, and thereafter the President received him and recognized his status as such.

On September 19, 1984, petitioners filed this action. Those petitioners included the National Council of the Churches of Christ in the U.S.A., a cooperative agency of 31 Protestant and Eastern Orthodox national religious communions with an aggregate membership of over 40 million and the National Association of Evangelicals, representing more than 3 million conservative Protestants and 42 denominations.

Petitioners also include several religious denominations including the American Baptist Churches in the U.S.A. with 5,817 local churches, the Presbyterian Church (U.S.A.) with 12,000 local congregations, the Church of the Brethern with 1,064 churches, Progressive National Baptist Convention, Inc. with approximately 1,600 local congregations as well as the Unitarian Universalist Association, and the American Humanist Association.

Petitioners brought this action pursuant to 28 U.S.C. § 1331 against the President, Secretary of State, Secretary of the Treasury, and the United States Ambassador to the Holy See. The complaint sought declarations under 28 U.S.C. §§ 2201 and 2202: that the President's actions in extending official recognition to the Holy See exceeded the President's Article II powers and violated both the Establishment Clause of the First Amendment and the liberty component of the Fifth Amendment to the United States Constitution.

Respondents filed a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure The court granted respondents' motion to dismiss. The district court ruled that no plaintiff had alleged the kind of particularized injury that would permit judicial recognition of standing to litigate the constitutional issues that had been raised. The district court, however, also opined that even assuming that some plaintiffs had the requisite standing, questions of diplomatic relations are committed by the Constitution to final decision by the Executive Branch and thus present non-justiciable political questions.

The Third Circuit Court of Appeals affirmed the decision of the district court, holding that none of the petitioners had standing to bring the action. The court of appeals also concluded that the Constitution had committed the question of the establishment of diplomatic relations exclusively to the Executive Branch and therefore determined that the question before the court was not justiciable.

REASONS FOR GRANTING THE WRIT

I. Lower Courts Have No Guidance From This Court As To What Injuries Are Sufficient To Confer Standing In Cases Alleging Executive Branch Violations Of The Establishment Clause.

Although the issues relating to the merits of this case are undeniably unique, the question of standing in Establishment Clause cases presented in this petition is a recurrent one. Rarely is there a clear-cut case of standing in Establishment

Clause cases. In such cases, the issue of standing is often litigated separately, resulting in an increased burden on court dockets. One reason for the lack of clarity on the standing issue is the dearth of precedents outside the area of taxpayer standing.

With the restriction of taxpayer standing to cases challenging congressional spending programs, the question of standing to challenge Executive Branch violations of the Establishment Clause remains completely unaddressed by this Court except for the Court's rejection of citizen standing in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1981). In light of recent decisions labeling administration of congressionl spending programs as executive actions[2] and therefore beyond the reach of taxpayer plaintiffs, the need for guidance from this Court has become vital.

Much confusion has resulted in recent years from the overbroad application of this Court's opinion in *Valley Forge*. In *Valley Forge* this Court rejected the theory of citizen standing. The Court ruled that standing cannot be conferred upon a plaintiff by virtue of the plaintiff's interest and commitment to a constitutional principle. The Court held that a fervent advocate for a claim that the Establishment Clause had been violated could not substitute for the requirement that the plaintiffs have a personal stake in the outcome of the suit. An allegation of a specific injury resulting from the constitutional violation was required. The Court concluded "[the plaintiffs'] claim that the government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.*, at 487.

Unfortunately, the lower courts in the instant case have latched on to certain language in *Valley Forge* to develop an analytical approach to standing in Establishment Clause cases

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[2] *See Pulido* v. *Bennett*, No. 85-1096-CV-W-8, slip op. (W.D. Mo. June 25, 1986).

that incorrectly focuses on the motivation of the plaintiffs and not on the injury alleged. But the fact that a plaintiff is motivated more by a belief in a constitutional principle than by a desire to remedy his own personal injury is irrelevant. This Court has recognized this fact:

> As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613.

United States v. *SCRAP*, 412 U.S. 669, 689, n.14 (1973).

The result of the Third Circuit opinion in this case has been to create grave doubt about what type of injury, if any, will confer standing in cases alleging Establishment Clause violation by the Federal Government that fall outside the narrow grant of taxpayer standing established in *Flast* v. *Cohen*, 392 U.S. 83 (1968). This case presents an opportunity to clearly set forth the types of constitutional injuries that will suffice for standing.

Although in the context of a Fourteenth Amendment case this Court has recognized in *Allen* v. *Wright*, 468 U.S. 737 (1984), that unequal treatment and stigmatic injuries could confer standing, the ultimate finding of a lack of standing in that case has left doubt as to the applicable standard. The issue of the sufficiency of the injuries in *Allen* was clouded by the intervention of private discriminatory actions between the injury alleged and the government action challenged. This case contains no such attenuated line of causation. There is a clear causal connection between the injuries alleged and the putatively illegal action of the government.

If the opinion of the Third Circuit remains standing, it will be one of the few cases filling the void in this sensitive area.[3] This

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[3] In *Pulido*, n.3, *supra*, the court relied almost exclusively on the

will affectively nullify the Establishment Clause in one of its core purposes.

A. This Court Should Rule That Its Decisions Under The Fourteenth Amendment Recognizing Unequal Treatment As An Injury-In-Fact Apply Equally To Establishment Clause Cases.

The unique nature of the Establishment Clause, among all the provisions of the Bill of Rights, requires careful analysis of, and peculiar sensitivity to, the claims of plaintiffs when deciding questions of standing in Esablishment Clause cases. Alone among the provisions of the Bill of Rights, the Establishment Clause does not confer a right the essence of which is individual freedom from government coercion. While crucial to individual liberty, the Establishment Clause "rather than directly protecting individual rights, structures the relations between the two institutions of church and state." Esbeck, *Church-State Relations*, 4 Pub. L. Forum 325, 336 (1985).

In order to meet the standing requirements of Article III, a plaintiff must:

> "[S]how that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976).

Valley Forge, 454 U.S., at 472.

Third Circuit's opinion in this case and the Court's decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1981), in ruling that no standing existed in that case challenging the administration of Chapter 1 in Missouri.

Despite the unique nature of the Establishment Clause, individuals and organizations may suffer particularized injuries as a result of an Establishment Clause violation. In order to recognize such an injury, it is necessary to first look at the evils that the Establishment Clause was meant to protect against.

In *Gillette* v. *United States*, 401 U.S. 437, 449-450 (1971), the Court stated:

> An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion. . . .

More recently Justice Brennan, writing for the majority of the Court in *Larson* v. *Valente*, 456 U.S. 228 (1982), stated:

> The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.

Id., at 244. Justice Rehnquist, dissenting in *Wallace* v. *Jaffree*, 105 S.Ct. 2479, 2520 (1985), said:

> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.

This concept that the Establishment Clause requires neutrality between denominations has been frequently stated by this Court. *See, Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-746 (1976) ("The Court has enforced a scrupulous neutrality by the State, as among religions. . . ."); *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947) (Government must "be neutral in its relations" with religions.); *Zorach* v. *Clausen*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects. . . ."); *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion.").

Disparate treatment and denominational preference are precisely the injuries alleged in the complaint. It must first be understood that the basic allegation on which the entire case is premised is that the United States established diplomatic relations with the Catholic Church, to wit: the Holy See and not with the territorial sovereignty of the State of Vatican City. For purposes of deciding the question of standing, this allegation must be accepted as true. *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

Petitioners contend that as a result of the exchange of diplomatic representatives between the United States Government and the Roman Catholic Church "[o]ne major faith group *does and will have* a special and unique ongoing relationship with the United States Government, not just as citizens of the United States petitioning their government, nor as religious leaders conversing with the President of the United States, but as diplomats, ministers plenipotentiary with formal, continuing access to the head of state of the United States." (App. 63a) Church petitioners further contend that "[o]ne denomination *does and will have* direct access to the President of the United States in a way that no other religious body has. Named plaintiffs include religious organizations and leaders of religious organizations *that do not and will not have* direct access to the head of state of the United States. *Such organizations and their leaders are thus personally denied equal treatment.*" (App. 63a) (emphasis added)

Petitioners' Complaint further alleges that the petitioner churches will be injured because "the actual or symbolic preference of the United States Government for one church enhances the ability of that church to compete in the religious marketplace, with a corresponding loss of public attention, acceptance, membership and church revenue to plaintiffs' churches." (App. 64a) Petitioners further allege that "the effect of the government's actions is to confer the imprimatur of state approval on one particular church to the exclusion of all others including each of the religious organizations which are plain-

tiffs in this action." (App. 64a) In addition, "the mere appearance of a continuing joint exercise of church and state involvement of the United States Government with a church headquarters provides a significant symbolic benefit to the Roman Catholic Church and a corresponding detriment to all other church organizations." (App. 61a)

Further, the churches which are petitioners in this lawsuit also claim that "the exchange of diplomatic missions between the United States and the Holy See provide certain Catholic clergy, who minister to the Roman Catholic Church in the United States, with certain diplomatic benefits, privileges, and immunities to which no clergy of any other religious body, including plaintiff religious organizations and their clergy, will ever be entitled." (App. 64a) Petitioner churches also state that these privileges and immunities include exemptions from all national, regional, or municipal dues and taxes, exemption from arrest or detention, exemption from all civil process, the free transmittal of correspondence relating to church and religious affairs at taxpayers' expense and the use of free transportation at taxpayers' expense.[4] (App. 65a)

Mr. Justice Frankfurter pointed out in his concurring opinion in *McGowan* v. *Maryland*, 366 U.S. 420, 463 (1961), that "[i]n view of the competition among religious creeds, whatever 'establishes' one sect disadvantages another, and vice versa." If a church body that is suffering from unequal treatment at the hands of the government has not by that fact suffered an injury sufficient to confer standing, it is difficult to comprehend any situation in which a plaintiff would have standing to challenge an Executive Branch violation of the Establishment Clause.

This Court has recognized unequal treatment in and of itself to be an injury sufficient to confer standing:

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[4] The complaint in this case is set out in its entirety in the Appendix beginning at p. 31a.

> In this case, appellee claims a type of personal injury we have long recognized as judicially cognizable. He alleges that the pension offset exception subjects him to unequal treatment. . . .

Heckler v. *Matthews*, 465 U.S. 728, 738 (1984) (footnote omitted). That the injury of unequal treatment in and of itself was sufficient to confer standing was made clear in *Heckler* by the fact that a severability clause in the statute under question precluded a remedy that would increase the plaintiff's benefits to a higher level. The Court held that the fact that the plaintiff would receive the same amount of benefits after winning his suit as he had been receiving prior to the suit did not work to deny standing. Similarly, the Court in *Allied Stores of Ohio* v. *Bowers*, 358 U.S.522 (1959), found that a taxpayer had standing to challenge the unequal imposition of a tax even though its tax burden would remain unchanged if it prevailed in the suit. Clearly, unequal treatment is an injury, elimination of unequal treatment redresses the injury.

The district court and the Third Circuit ignored the precedents of this Court recognizing the injury of unequal treatment. The district court stated, "Plaintiffs do not allege that the actions now challenged have caused a decline in the membership or revenues of any of the plaintiffs' denominations or organizations. . . ." (App. 26a) With this statement, the court seems to adopt the position rejected by this Court that an economic injury must be alleged to establish standing. *See*, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). The Third Circuit likewise failed to acknowledge unequal treatment as an injury sufficient to confer standing. In fact, the court even failed to recognize that the petitioners claimed such an injury as a basis for standing. The court simply characterized all of the petitioners' alleged injuries as "ones of adverse stigmatization." (App. 12a) The court then rejected these injuries as a basis for standing because of "the absence of any causal connection between them and the challenged governmental action." *Ibid.*

The court's finding of no causal connection between the alleged injuries and the governmental action makes sense only

if the court is requiring more than unequal treatment as an injury. That this is indeed what the court is requiring is made apparent in the succeeding paragraphs where the court points to the lack of any showing of a further more specific injury resulting from the unequal treatment afforded the petitioners in contrast to the Catholic Church.

In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court found that the plaintiffs had standing to pursue an equal protection claim based on the unequal apportionment of legislative seats among the several counties of Tennessee. The injury alleged was the debasement of the plaintiffs' votes. The Court held:

> It would not be necessary to decide whether appellants' allegations of impairment of their votes . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a claim, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman* v. *Miller*, 307 U.S., at 438, not merely a claim of "the right, possessed by every citizen, to require that the goverment be administered according to law. . . ." *Fairchild* v. *Hughes*, 258 U.S. 126, 129.

Id., at 208.

The plaintiffs in *Baker* were not required to allege that specific election results would have been changed or that legislative votes would have been altered had legislative seats been apportioned on a more equitable basis. The unequal effectiveness of their vote alone was an injury sufficient to confer standing to bring an equal protection claim. Here, the unequal status of the petitioners is sufficient to allow them to pursue their Establishment Clause claim.

The Third Circuit also seems to confuse matters of proof at trial with the sufficiency of allegations of injury. The court seems to reject the allegations of injury due to lack of proof. This Court recognized the importance of the distinction between the sufficiency of allegations of injuries and subsequent proof in *Trafficante* v. *Metropolitan Life Insurance Co.*,

409 U.S. 205, 209 (1972), and *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 115 (1979). This Court has stated:

> [T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

Allen v. *Wright*, 468 U.S., at 752. The Third Circuit failed completely to make such a careful evaluation of the petitioners' claims in this case. This failure is immediately evident in the court's statements regarding the identity of the petitioners. The court's opinion begins by reciting the complaint's allegations as to the nature of the petitioner Americans United for Separation of Church and State (App. 5a). At this point the court ends any further detailed inquiry into the identity and nature of the other petitioners. It cavalierly refers to the remaining plaintiffs as "twenty organizations that may be loosely defined as religious, twelve officials of those organizations and 71 individual members of the clergy of various denominations." (App. 5a) What the court doesn't say is that among those organizations that it "loosely defined as religious" are six religious denominations. Also included are two organizations, the National Association of Evangelicals and the National Council of the Churches of Christ in the U.S.A., that represent 42 and 31 denominations respectively. These two organizations often represent the interests of their constituent members in dealing with the Executive Branch of the government. Recognition of the specific identity of the various plaintiffs is crucial to a proper analysis of the standing question in this case. The denominational plaintiffs are the direct counterparts of the Roman Catholic Church hierarchy now enjoying official diplomatic relations with the United States. Many of the individual petitioners perform the same function for their denomination or organization as the apostolic pro nuncio performs for the Catholic Church. These petitioners are directly injured by the preferred status given to the Roman Catholic Church and its official representative. The Third Circuit displayed a complete disregard for the allegations in the complaint

as to the identity of the petitioners and the nature of their injuries when it dismissed their standing with the following statement:

> [W]e believe that the status of religious adherent is insufficiently distinguishable from the type of citizen standing claimed in *Valley Forge* to allow standing in this case.

(App. 13a)

B. The Third Circuit Was Wrong To Hold That There Was No Causal Connection Between The Government Action Challenged And The Stigmatic Injuries Alleged In A Case Involving No Intervening Discriminatory Action By Private Parties.

The Third Circuit opinion is contrary to the rulings of this Court that recognize stigmatization as an injury sufficient to accord standing in certain cases. In *Allen* v. *Wright*, 468 U.S., at 755, this Court, while rejecting the claim of plaintiffs in that case, acknowledged that stigmatization could be an injury sufficient to establish standing:

> There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. *See Heckler* v. *Matthews*, 465 U.S. 728, 739 (1984). Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct, *ibid.*

In this case the petitioners have personally been denied equal treatment. This unequal treatment is a direct consequence of the establishment of diplomatic relations between the United States Government and the Holy See. The Third Circuit, in order to avoid finding standing, relied on *Allen* to hold that the stigmatic injury in this case had only a "remote and speculative" relationship to the governmental activity complained of. This is a complete misapplication of the holding in *Allen*. In *Allen* the discriminatory action was taken by private schools. The government activity complained of was the grant-

ing of tax exempt status to these schools. In this case there is no intervening private party. The discriminatory action in this case is the government action complained of. In cases in which a violation of the Establishment Clause is claimed, it is particularly appropriate that stigmatic injuries accord standing to sue. Those are just such injuries that the Establishment Clause was designed to protect against:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrine. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. . . .
>
> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School District of Grand Rapids v. *Ball*, 105 S.Ct. 3216, 3226 (1985).

The petitioners in this case are not only adherents of non-favored denominations, but the non-favored denominational organizations themselves. They complain of the symbolic union between the United States Government and the Roman Catholic Church and the detrimental effect this union will have on their churches. If stigmatic injuries are ever enough to confer standing, and this Court has ruled that they can be enough, then they must confer standing in this case. Nowhere in our constitutional scheme have our courts been more sensitive to stigmatic injury than in the area of church-state relations.

II. This Court Should Address The Fundamental Question Of The Power Of Federal Courts To Review Allegations That Actions Of The President Are Beyond His Article II Powers And Violate Fundamental Constitutional Restraints On The Federal Government.

The Third Circuit in essence ruled that because the question presented by this case may touch on foreign relations, it is thereby *ipso facto* outside the province of judicial review. However, a noted constitutional authority contends that such an absolutist position is unsound, stating:

> Notwithstanding the foregoing precedent and language, it is suggested that the courts will in the future play a larger role in reviewing foreign affairs. The handwriting has been on the wall since 1962, when the Court remarked: "It is error to suppose that every case or controversy which touches foreign relations lies beyond the judicial cognizance."

Antieau, *Modern Constitutional Law*, § 15.28, p. 672 (1969), citing *Baker* v. *Carr*, 369 U.S. 186 (1962).

In *Baker*, 369 U.S., at 211, the Court stated that in "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine."

The error in the Third Circuit's analysis of this issue lies in the fact that it failed to accept as true the allegations that the relations established were not with a foreign state to which Article II powers relate, but rather with a church. The Third Circuit began its discussion with the statement, "Because the Vatican [is a territorial sovereignty], the question of whether

the President may constitutionally establish diplomatic relations with a church *qua* church is not presented by this action." (App. 8a, note 1). Yet this is precisely the question that is raised by the allegations of the complaint. The complaint is replete with allegations that the Holy See, the entity with which diplomatic relations were established, is a separate entity from the state of Vatican City, the territorial sovereignty. Among the allegations is the statement of Archbishop Pio Laghi, Apostolic Pro Nuncio in the United States, delivered almost contemporaneously with his appointment,[5] making precisely this point:

> Papal diplomacy has been referred to as *sui generis* because nowhere is it exactly paralleled. In fact, the Catholic Church is the only religious body that I know of that engages in direct relations with various states. You recall the confusion and controversy that arose in the media at the time it was announced that the United States and the Holy See intended to re-establish diplomatic ties. Some mistakenly tried to justify the American government's action by implying that it was entering into a diplomatic relationship not with the Roman Catholic Church as such, the Holy See, but rather with the sovereign Vatican City-State.

(Complaint ¶ 78, App. 53a). The very essence of the detailed factual allegations in the complaint is that the United States has established diplomatic relations with the Roman Catholic Church as such. The district court recognized as much when it said:

> Every one of plaintiffs' contentions in this litigation is based upon the premise that "the Vatican" or the "Holy See," with which the exchange of ambassadors has occurred, is essentially a church rather than a state. . . . The record provides considerable support for the proposition that the Vatican/Holy See views itself in that light.

---

[5] Archbishop Pio Laghi's entire address is set out in the Appendix beginning at p. 71a.

(App. 27a) Thus, the constitutional focus should not be on Article II of the Constitution, but on the First Amendment. As stated in *Baker* v. *Carr*, 369 U.S., at 217:

> The courts cannot reject as "no lawsuit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

The Court in *Baker*, *id.*, at 213-214, warns that the deference to be paid to the Executive Branch rests on reason, not habit. The Court suggests that clearly definable criteria for a decision in a case may be available to the Court, and in such a case the political question barrier falls away.

The Third Circuit is in essence (in spite of the declarations of the Pro Nuncio himself, statements from Canon Law, and declarations from various other authorities) claiming that a federal court has no right to open its eyes and to observe an obvious mistake or misrepresentation as to the relationship established. Once it is recognized that the relationship is not with another state, but with a church, the Article II political question doctrine falls away, and the testing of the constitutional arrangement must be measured against the Religion Clauses of the First Amendment to the U.S. Constitution.

This case basically involves the denial of equal protection to religious organizations, their leaders, and adherents under the First and Fifth Amendments to the United States Constitution. As in *Baker* v. *Carr*, "the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which . . . [petitioners] are entitled to a trial and decision. The right asserted is within the reach of judicial protection under the . . . [First and Fifth Amendments]." See *Baker*, 369 U.S., at 237.

It must be remembered that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no

other source. It can only act in accordance with all of the limitations imposed by the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 5-6 (1957). *See* also *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984).

The petitioners have no quarrel with the statements of the Third Circuit regarding the unreviewable nature of a President's decision as to whether a country has the requisite sovereignty to entitle it to diplomatic recognition and as to which government is the legitimate recipient of such recognition. This case does not seek review of such a decision. It is undisputed that such decisions are committed solely to the President by the Constitution. What is not committed to the President by the Constitution, indeed what is prohibited by the Establishment Clause is the power to establish diplomatic relations with a church. That is the action alleged in the complaint to have been taken by the President. That is the question the courts are asked to decide in this case. It is a threshold question that must be resolved before the political question doctrine is even implicated. It is a question the courts have the power and the duty to answer in order to uphold the constitutional rights of the petitioners.

III. The Issues Relating To The Reviewability Of The President's Actions Are Not Limited To The Facts Of This Case But May Arise In Other Situations.

The importance of the issues presented in this case regarding the reviewability of the President's actions transcend the unique factual setting in which they arise. The Third Circuit opinion, as it now stands, gives a license to the President to be the sole arbiter of the extent of his powers. If the President's flaunting of the Establishment Clause in exchanging ambassadors with a church is beyond review because the power to appoint and receive ambassadors is textually committed to the President by the Constitution, then the unconstitutional exercise of any Article II power by the President would be beyond review.

Such an extreme interpretation of the political question doctrine is contrary to the limits placed on this doctrine in *Baker* v. *Carr*, 369 U.S. 186 (1962). This Court should not let stand a decision containing so much potential for danger to our constitutional system of government.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Dated: July 24, 1985

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1309

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ROBERT L. MADDOX, Individually and as Executive Director of Americans United for Separation of Church and State; AMERICAN BAPTIST CHURCHES IN THE U.S.A.; ROBERT C. CAMPBELL, Individually and as General Secretary of the American Baptist Churches in the U.S.A.; AMERICAN COUNCIL OF CHRISTIAN CHURCHES OF CALIFORNIA; EDGAR R. KOONS, Individually and as President of the American Council of Christian Churches of California; AMERICAN HUMANIST ASSOCIATION; FREDERICK EDWARDS, Individually and as Executive Director of the American Humanist Association; CHURCH OF THE BRETHREN; ROBERT W. NEFF, Individually and as General Secretary of the Church of the Brethren; COUNCIL ON RELIGIOUS AND CIVIL LIBERTY; INSTITUTE OF WOMEN TODAY; THE NATIONAL ASSOCIATION OF EVANGELICALS; BILLY A. MELVIN, Individually and as Executive Director of the National Association of Evangelicals; NATIONAL ASSOCIATION OF LAITY; JOSEPH T. SKEHAN, Individually and as President of the National Association of Laity; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.; BISHOP PHILIP COUSIN, Individually and as President of the National Council of the Churches of Christ in the U.S.A.; THE NATIONAL COALITION OF AMERICAN NUNS; OHIO ASSOCIATION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; G. WEIR HARTMAN, Individually and as Executive Director of Ohio Association for Public Education and Religious Liberty; PRESBYTERIAN CHURCH (U.S.A.); PROGRESSIVE NATIONAL BAPTIST CONVENTION, INC; C.J. MALLOY, JR., Individually

and as General Secretary of the Progressive National Baptist Convention, Inc.; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALISTS FOR RELIGIOUS FREEDOM; KEN GJEMRE, Individually and as Chair of Unitarian Unitarian Universalists for Religious Freedom; HIGH WOODS REFORMED CHURCH; RIGHT REV. H. COLEMAN MCGEHEE, JR.; JAMES MANKIN; GARY M. BEAUCHAMP; GASTON D. COGDELL; P.D. WILMETH; J.P. SANDERS; JAMES J. BROWN; W.L. LUMPKIN; ROBERT D. HUGHES; ROBERT A. PARKER; ALTON H. MCEACHERN; E. MALLARY BINNS; JAMES A. LANGLEY; MALCOM G. LUNCEFORD; CHARLES H. ASHCRAFT; RUDY A. PULIDO; C. WELTON GADDY; IRA H. PEAK, JR.; JAMES LEO GARRETT, JR.; PAUL GRIFFIN JONES, II; LEON HYATT, JR.; PHIL DOWELL STRICKLAND; RABBI BALFOUR BRICKNER; LARRY L. LEWIS; BERNARD F. DIDIER; JAMES P. ARCHIBALD; WILLIAM V. WIIST; R. LEE KRETZ; MITCHELL A. TYNER; WILLIS ADAMS; EDWIN E.G. SHAFER; GORDON W. ZUTZ; EDD DOERR; DAVID D. VAN STRIEN; THEODORE A. WEBB; JAMES F. HORNBACK; DAVID M. HOWARD; L.J. PETERSON; RONALD B. FLOWERS; NORMAN J. BAUER; FRED SCHWENGEL; GLEN A. HOLMAN; AUGUSTA P. FINKELSTEIN; CAROLYN E. MORGAN; MARY LEE S. O'NEAL; MARY BETH BECK; WALTER B. PONTYNEN, JR.; JAMES C. WEYDERT; LYNN L. WEYDERT; MICKIE L. WEYDERT; BERNICE G. GEORGE; BARBARA MOON; WILBUR F. HERMANCE; FLORIDA S. ESCHENBACH; JEWEL E. MORRISON; STEWART M.L. POLLARD; WENDELL PHILLIPS BERWICK; C.R. CALEY; CHARLES H. SUMNER; LEA W. CLAYTON, JR.; ALBERT R. DILLEY; FRANCIS W. HENSLEY; ROBERT R. TILITZ; MARIO CUNIBERTI; JAMES T. MCCOLLUM; W.B. TICHENOR; CAROLINA C. CAPISTRANO; ALVIN W. STUART; JOHN V. STEVENS, SR.; HARRY F. MICHAELS; BAPTIST GENERAL ASSOCIATION OF VIRGINIA; ADVENTIST LAYMEN'S FOUNDATION OF ARKANSAS; ADVENTIST LAYMENS' FOUNDATION

OF ARKANSAS; ADVENTIST LAYMEN'S FOUNDATION OF MISSISSIPPI.

Appellants

v.

RONALD W. REAGAN, As President of the United States of America; UNITED STATES OF AMERICA; GEORGE P. SHULTZ, As Secretary of State; DEPARTMENT OF STATE; JAMES A. BAKER, As Secretary of the Treasury; DEPARTMENT OF THE TREASURY; and WILLIAM A. WILSON, As the United States Ambassador to the Holy See

(D.C. Civil No. 84-4476)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: January 16, 1986
Before: SEITZ and GIBBONS, *Circuit Judges*
and GERRY, *District Judge**

(Opinion Filed: March 21, 1986)

LEE BOOTHBY, ESQ. (Argued)
208 West Mars Street
Berrien Springs, MI 49103

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*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Americans United for Separation of Church and State and others appeal from a judgment dismissing their amended complaint against the President of the United States, the Secretary of the Treasury, and the United States Ambassador to the Vatican. The complaint sought declarations (1) that congressional actions consenting to the appointment of and funding for a diplomatic mission to the Vatican violate the first amendment and (2) that the President's actions in extending diplomatic recognition to the Vatican—sending an ambassador to and receiving an ambassador from the Vatican—exceed the President's article II powers and violate both the first amendment and the liberty clause of the fifth amendment. The complaint sought a permanent injunction against funding of the diplomatic mission to the Vatican and an order enjoining the Ambassador from engaging in ambassadorial activity. The district court granted the defendants' Rule 12(b) motion to dismiss on the grounds that the plaintiffs lacked standing and that the controversy was not justiciable. We affirm.

I. The Complaint

The amended complaint alleges that Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges of the Constitution. Other plaintiffs included twenty organizations that may be loosely defined as religious, twelve officials of those organizations, and seventy-one individual members of the clergy of various denominations. It is alleged that each individual plaintiff is a citizen, a federal taxpayer, and a voter.

According to the complaint the United States appointed a counsul to the Papal States on June 26, 1797, and that in 1847 formal diplomatic relations beyond the consular level were established. That relationship continued until 1867 when a

controversy arose over the prohibition in the City of Rome of public worship by non-Roman Catholic denominations. Reacting to that controversy, Congress, in "An Act Making Appropriations for the Consular and Diplomatic Expenses of the Government for the Year ending thirtieth June eighteen hundred and sixty-eight, and for other Purposes," legislated that "no money hereby or otherwise appropriated shall be paid for the support of an American legation at Rome, from and after the thirtieth day of June, eighteen hundred and sixty-seven." Act of Feb. 28, 1867, ch. 99, 14 Stat. 412, 413. As a result of that legislation the United States terminated diplomatic relations with the Papal States.

In 1873 the modern Kingdom of Italy annexed the Papal States. In 1929, however, in the Lateran Treaty, the Kingdom of Italy recognized the "State of the City of the Vatican" while the Holy See renounced its claims over territory outside the Vatican City. The present State of the City of the Vatican is comprised of 108 acres of territory and has a population slightly in excess of 1000. Located in that territory is the world headquarters of the Roman Catholic Church.

It is alleged that beginning in 1939, and from time to time thereafter until 1984, several Presidents of the United States designated personal representatives to the Vatican. These personal representatives served without salary and were not subject to Senate confirmation.

On November 22, 1983 Congress repealed the restriction, contained in the 1867 Act, against expenditures for the support of the American Legation at Rome. *See* Act of Nov. 22, 1983. Pub. L. No. 98-164, § 134, 1983 U.S. Code Cong. & Ad. News (97 Stat.) 1017, 1029. At that time William A. Wilson was serving as President Ronald W. Reagan's personal representative. On January 10, 1984 President Reagan announced he would nominate Mr. Wilson as United States Ambassador to the Vatican: the Senate confirmed Mr. Wilson as Ambassador on March 7, 1984. Pursuant to general legislation dealing with the support of diplomatic missions, the State Department des-

ignated funds for Mr. Wilson's salary and for other expenses relating to the support of the mission to the Vatican.

The amended complaint alleges that the receipt of a diplomatic representative from, or the appointment of a diplomatic representative to, the Vatican violates the powers granted the President by article II of the Constitution, in that the Vatican is not a state upon which the President may confer diplomatic recognition. It alleges further that the establishment of diplomatic relations with the Vatican amounts to an establishment of religion in violation of the establishment clause of the first amendment. Finally, it alleges that the establishment of diplomatic relations constitutes a special preference of one religious group over others in violation of the equal protection component of due process clause of the fifth amendment.

Addressing their standing to litigate the foregoing constitutional issues, the plaintiffs alleged in paragraph ninety-five of their amended complaint that, in addition to the alleged injury they have suffered as taxpayers, they have suffered particularized injury in fact in that (a) they have been denied equal access to the Executive Branch of the United States Government because one denomination will have access through someone enjoying diplomatic status while they will have access only as citizens and religious leaders conversing with the President; (b) "the spiritual and moral teachings and beliefs of one church which asserts certain of those beliefs in the political arena of the United States will have a continuing relationship with the United States Government . . ."; (c) the symbolic preference for the Roman Catholic Church implicit in the United States Government's diplomatic recognition of the Vatican will enhance the ability of that church to compete in the religious marketplace; (d) the diplomatic relations will lead to interference by the President in the internal affairs of the Roman Catholic Church in the United States to the detriment of the church's members; (e) the establishment of diplomatic relations confers on the person designated by the Vatican as Papal Nuncio to the United States the benefits of the privileges and immunities of the statutes protecting diplomats (22 U.S.C. §§

254(a)-(e), 256-258(a) (1982 & Supp. I 1983)) and the protections of the Vienna Convention on Diplomatic Relations (Apr. 18, 1961, 23 U.S.T. 2339, T.I.A.S. No. 7502) while no other clergymen are so protected; (f) plaintiffs are subjected to indirect pressure to conform to an unspecified governmental policy that flows from the diplomatic relationship; (g) plaintiffs, not enjoying diplomatic relations, "are seen as second-class citizens, subscribing to religions of lesser worth"; and (h) the fusion of the United States' political interests with the religious position of the papal leadership brought about by the diplomatic relationship jeopardizes in an unspecified way "the foreign mission work" of the plaintiffs.

II. The District Court Ruling

The district court dismissed the complaint for two independent reasons. First, the court ruled, no plaintiff alleged the kind of particularized injury that would permit judicial recognition of standing to litigate the tendered constitutional issues. Second, even assuming that some plaintiff had the requisite standing, questions of diplomatic relations are committed by the Constitution to final decision by the Executive Branch and thus present nonjusticiable political questions.

III. Discussion

We start with two palpable facts pleaded in the complaint. The State of the City of the Vatican is a territorial sovereignty, however small its size and population. The head of the Roman Catholic Church controls the government of that sovereign territory. No other religious organization that is a plaintiff, or in which individual plaintiffs are members, is similarly situated. If the Roman Catholic Church's unique position of control of a sovereign territory gives it certain advantages that other religious organizations do not enjoy, those advantages cannot be the concern of the constitutional provisions upon which the plaintiffs rely.[1] Consequently, in prosecuting their complaint,

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[1] Because the Vatican is so situated, the question of whether the President may constitutionally establish diplomatic relations with a church *qua* church is not presented by this action.

the plaintiffs must rely upon actions by the President and Congress that cause injury to them in some manner different from and independent of the disadvantages that result from the unique status of the Vatican in the world community. With that thought in mind we turn to the issue whether the district court properly dismissed the complaint.

A. Standing

The plaintiffs assert standing in three capacities; as taxpayers, as citizens and voters, and as victims of stigmatization. Although their complaint is not specific in this respect, we read it to allege that as taxpayers they have standing to challenge expenditures for the payment of Mr. Wilson's salary and the cost of maintaining the embassy he occupies; that as citizens they have standing to insist that the court order the President to observe the Constitution; and that as religious organizations and members thereof they have standing to challenge Executive Branch action that stigmatizes all noncatholic churches and their members. We address each allegation.

1. Taxpayer Standing

The basic rule with respect to the standing of federal taxpayers to challenge expenditures of funds by the federal government is that laid down many years ago in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). Noting that "[t]he right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court." *id.* at 486, Justice Sutherland addressed that question. Holding that individual taxpayers lack standing to seek such relief, he explained.

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification of some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and

> declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488.

The plaintiffs urge, however, that the basic *Frothingham* rule does not control the standing issue in this case, suggesting instead that they qualify for the exception, articulate in *Flast* v. *Cohen*, 392 U.S. 83 (1968), covering challenges to federal expenditures for the establishment of religion. Although the *Flast* exception represents a significant departure from the *Frothingham* rule, Chief Justice Warren's opinion in the former case identifies clear limits to the exception. The plaintiffs in *Flast*, rather than challenging expenditures bearing on activities committed to federal regulation by articles I and II of the Constitution, instead challenged expenditures authorized solely by the general welfare provision in the taxing and spending clause (U.S. Const., art I. § 8, cl. 1). In *Flast* the Court held that the general welfare clause does not authorize direct financial support of religious schools. But the Chief Justice carefully confined the taxpayer standing exception he recognized, writing,

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to challenge the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish the nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the tax-

> payer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the power delegated to Congress by Art. I § 8.

Id. 102-03.

The plaintiffs here do not challenge an expenditure for which authority is found only in article I, section 8, clause 1. The repeal of the 1867 prohibition against maintaining a mission in Rome is not a spending enactment. And the general appropriation bill that authorizes support for foreign missions is a law "necessary and proper for carrying into Execution. . . Powers vested by the Constitution in the Government of the United States." U.S. Const., art I. § 8. cl. 18. The power in question—the conduct of foreign affairs—is not only vested in the Government of the United States, but is vested exclusively so. *Id.*, art. I. § 10, cl. 1. The Court in *Flast*, by carefully limiting taxpayer standing to challenges of expenditures solely dependent upon the taxing and spending clause, made clear that one's status as a taxpayer did not confer upon one standing to challenge the exercise of other governmental powers, as this court has so held. *See Americans United for Separation of Church and State* v. *Department of Health, Education & Welfare*, 619 F.2d 252, 260 (3d Cir. 1980), *rev'd on other grounds, Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

The Supreme Court has recently reaffirmed the continued vitality of the basic *Frothingham* rule with respect to taxpayer standing. *See Valley Forge*, 454 U.S. at 477. Indeed the Court stated that *Flast* did not even reach Executive Branch actions. *See id.* at 479. Thus we hold that, to the extent plaintiffs rely on their taxpayer status, they lack a sufficient protectable interest to permit them to litigate the question of expenditures for the support of a diplomatic mission to the Vatican. Their challenge to the diplomatic recognition itself, distinct from the challenge to funding of the mission, is even more remote from their status as taxpayers.

2. Citizen Standing

The allegations in the plaintiffs' complaint that addressed particularized injury do not suggest that the injuries complained of invade any specific right conferred on them by virtue of their citizenship. Aside from the right to vote and to hold certain public offices, there are very few rights of citizenship as such. The Supreme Court has consistently rejected claims of citizen standing predicated upon the right, possessed by every citizen, to require that the government be administered in accordance with the Constitution. *Allen* v. *Wright*, 104 S. Ct. 3315, 3326 (1984); *Valley Forge*, 454 U.S. at 482-83; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 216-17 (1974); *Laird* v. *Tatum*, 408 U.S. 1, 11-14 (1972); *Baker* v. *Carr*, 369 U.S. 186, 208 (1962); *Ex Parte Levitt*, 302 U.S. 633 (1937) (per curiam); *Fairchild* v. *Hughes*, 258 U.S. 126, 129-30 (1922). Thus we hold that, to the extent plaintiffs rely on their status as citizens, they lack a sufficient protectable interest to permit them to litigate the issue either of the expenditure of funds or of diplomatic recognition.

3. Standing As Victims Of Stigmatization

Finally, the plaintiffs seek to establish particularized injury different from that they alleged to have suffered as taxpayers and citizens. Their allegations may fairly be characterized as ones of adverse stigmatization that result from (1) their being deprived of the benefits of diplomatic recognition enjoyed by the Vatican and thus the Roman Catholic Church; and (2) their being cast in an adverse light because they cannot enjoy those benefits. One legal shortcoming with the alleged injuries, however, is the absence of any causal connection between them and the challenged governmental action.

The plaintiffs allege, for example, that diplomatic recognition will afford to one church a form of access to the Executive Branch superior to that which is available to other religious organizations for influencing the conduct of the Executive Branch at home or abroad. Yet, the plaintiffs offer no explana-

tion as to why a communication to the Executive Branch through a diplomat would be any more effective than would be a letter from the plaintiffs or a luncheon meeting between the President and a prominent cleric. They allege that diplomatic recognition will result in the President having undue influence in the internal affairs of the Roman Catholic Church, yet they offer no explanation as to why a diplomatic communication from the President would be any more intrusive than would be a communication through a personal representative or a phone call to an archbishop. They allege that the existence of diplomatic relations will subject them to pressure to conform to government policies of which the Roman Catholic Church approves, yet they offer no explanation as to why the delivery of a statement of church position through a diplomat would be any more influential upon the plaintiffs' conduct than would be the publication of the same statement in the national press.

Plaintiffs attempt to sidestep the formidable bar to citizen standing presented by *Valley Forge*. They claim standing as religious adherents and organizations and argue that such status differentiates them from citizens presenting generalized grievances because differential treatment between churches by the government is itself a direct constitutional injury. While the plaintiffs' argument here has some initial appeal, we believe that the status of religious adherent is insufficiently distinguishable from the type of citizen standing claimed in *Valley Forge* to allow standing in this case.

It may be true, as plaintiffs allege, that as a result of opening diplomatic relations with the Vatican the Vatican's diplomatic representatives will enjoy the benefit of certain federal statutes and of the Treaty of Vienna. And it is true that plaintiffs' church representatives do not enjoy the same benefits. However, the benefits that may be available to the Vatican's representatives are available only because, unlike the plaintiffs' church organizations, the Vatican exercises territorial sovereignty over a small geographical area. It is this fact that accounts for the disparity of treatment of which the plaintiffs complain. The existence of such sovereignty arguably may

place the Roman Catholic Church in a more favorable light in the religious market, although such a suggestion seems extremely speculative. But if it does, the complaint leaves one entirely in the dark as to how diplomatic recognition of the conceded territorial sovereignty widens the gap in that marketplace.

The Supreme Court has recognized that noneconomic injuries such as stigmatization can be a basis for demanding legal redress. *E.g. Heckler* v. *Matthews*, 104 S. Ct. 1387, 1395-96 (1984). The Court has cautioned, however, that the assertion of stigmatizing injuries having only remote or speculative relationships to the governmental activities complained of may not be used to circumvent the rules governing nonjusticiability of generalized grievances by taxpayers or citizens. As Justice O'Connor wrote in *Allen*, "Our cases make clear . . . that such [stigmatizing] injury accords a basis for standing only to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct. . . .'" 104 S. Ct. at 3327 (quoting *Heckler*, 104 S. Ct. at 1387). Moreover the stigmatization must be one that is likely to be relieved by a favorable decision. *Allen*, 104 S. Ct. at 3315; *Valley Forge*, 454 U.S. at 472; *Simon* v. *Eastern Kentucky Rights Organization*, 426 U.S. 26, 41-42 (1976).

Applying the teaching of these cases, we hold that the "direct and palpable injuries" alleged by the plaintiffs are legally insufficient to establish standing to challenge the funding and diplomatic-recognition actions of which they complain.

B. Justiciability

Assuming, arguendo, that some plaintiff has standing to contest the actions complained of, there remains the hurdle of justiciability. The complaint can only be read as a request for judical review of the President's decision to extend diplomatic relations to the Vatican. Such review presents two questions: (1) is the Vatican a territorial sovereignty sufficiently independent of other such sovereign entities as to be entitled to recog-

nition?; and (2) Is the regime claiming to be its government entitled to recognition as such?

It has long been settled that the President's resolution of such questions constitutes a judicially unreviewable political decision. *See National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137 (1938). That the cases referred to remain authoritative is confirmed by language in *Baker* v. *Carr*, 369 U.S. 186 (1962), the case most frequently cited in discussions of the nonjusticiability of certain issues. In *Baker* Justice Brennan noted, "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate branch of government. . . ." *Id.* at 217. *See also Powell* v. *McCormack*, 395 U.S. 486, 521 n.43 (1969). There is such a textually demonstrable commitment with respect to recognition of foreign states. Only the President has the power to "receive Ambassadors and other public Ministers." U.S. Const., art. II, § 3. Only the President has to the power to appoint ambassadors, other public ministers, and consuls, although those appointments require the advice and consent of the Senate. *Id.*, art II, § 2, cl. 2. Diplomatic relations are established by receiving and sending ambassadors or other public ministers. The decision of the Constitutional Convention to confer this power on the President alone carried forward the preexisting practice that only the King, not Parliament "ha[d] the sole power of sending ambassadors to foreign states, and receiving ambassadors at home." L.W. Blackstone, Commentaries 253.

Legal challenges to the establishment of diplomatic relations require the review of one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch. Thus, even assuming that some plaintiff could satisfy the standing required to go forward with this action, a federal court could not grant the plaintiffs the relief they seek.

Conclusion

The district court did not err in dismissing the complaint. The judgment appealed from will therefore be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1309

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ROBERT L. MADDOX, Individually and as Executive Director of Americans United for Separation of Church and State; AMERICAN BAPTIST CHURCHES IN THE U.S.A.; ROBERT C. CAMPBELL, Individually and as General Secretary of the American Baptist Churches in the U.S.A.; AMERICAN COUNCIL OF CHRISTIAN CHURCHES OF CALIFORNIA; EDGAR R. KOONS, Individually and as President of the American Council of Christian Churches of California; AMERICAN HUMANIST ASSOCIATION; FREDERICK EDWARDS, Individually and as Executive Director of the American Humanist Association; CHURCH OF THE BRETHREN; ROBERT W. NEFF, Individually and as Secretary of the Church of the Brethren; COUNCIL ON RELIGIOUS AND CIVIL LIBERTY; INSTITUTE OF WOMEN TODAY; THE NATIONAL ASSOCIATION OF EVANGELICALS; BILLY A. MELVIN, Individually and as Executive Director of the National Association of Evangelicals; NATIONAL ASSOCIATION OF LAITY; JOSEPH T. SKEHAN, Individually and as President of the National Association of Laity; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.; BISHOP PHILIP COUSIN, Individually and as President of the National Council of the Churches of Christ in the U.S.A.; THE NATIONAL COALITION OF AMERICAN NUNS; OHIO ASSOCIATION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; G. WEIR HARTMAN, Individually and as Executive Director of Ohio Association for Public Education and Religious Liberty; PRESBYTERIAN CHURCH (U.S.A.); PROGRESSIVE NATIONAL BAPTIST CONVENTION, INC; C.J. MALLOY, JR., Individually and as

General Secretary of the Progressive National Baptist Convention, Inc.; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALISTS FOR RELIGIOUS FREEDOM; KEN GJEMRE, Individually and as Chair of Unitarian Unitarian Universalists for Religious Freedom; HIGH WOODS REFORMED CHURCH; RIGHT REV. H. COLEMAN MCGEHEE, JR.; JAMES MANKIN; GARY M. BEAUCHAMP; GASTON D. COGDELL; P.D. WILMETH; J.P. SANDERS; JAMES J. BROWN; W.L. LUMPKIN; ROBERT D. HUGHES; ROBERT A. PARKER; ALTON H. MCEACHERN; E. MALLARY BINNS; JAMES A. LANGLEY; MALCOM G. LUNCEFORD; CHARLES H. ASHCRAFT; RUDY A. PULIDO; C. WELTON GADDY; IRA H. PEAK, JR.; JAMES LEO GARRETT, JR.; PAUL GRIFFIN JONES, II; LEON HYATT, JR.; PHIL DOWELL STRICKLAND; RABBI BALFOUR BRICKNER; LARRY L. LEWIS; BERNARD F. DIDIER; JAMES P. ARCHIBALD; WILLIAM V. WIIST; R. LEE KRETZ; MITCHELL A. TYNER; WILLIS ADAMS, EDWIN E.G. SHAFER; GORDON W. ZUTZ; EDD DOERR; DAVID D. VAN STRIEN; THEODORE A. WEBB; JAMES F. HORNBACK; DAVID M. HOWARD; L.J. PETERSON; RONALD B. FLOWERS; NORMAN J. BAUER; FRED SCHWENGEL; GLEN A. HOLMAN; AUGUSTA P. FINKELSTEIN; CAROLYN E. MORGAN; MARY LEE S. O'NEAL; MARY BETH BECK; WALTER B. PONTYNEN, JR.; JAMES C. WEYDERT; LYNN L. WEYDERT; MICKIE L. WEYDERT; BERNICE G. GEORGE; BARBARA MOON; WILBUR F. HERMANCE; FLORIDA S. ESCHENBACH; JEWEL E. MORRISON; STEWART M.L. POLLARD; WENDELL PHILLIPS BERWICK; C.R. CALEY; CHARLES H. SUMNER; LEA W. CLAYTON, JR.; ALBERT R. DILLEY; FRANCIS W. HENSLEY; ROBERT R. TILITZ; MARIO CUNIBERTI; JAMES T. MCCOLLUM; W.B. TICHENOR; CAROLINA C. CAPISTRANO; ALVIN W. STUART; JOHN V. STEVENS, SR.; HARRY F. MICHAELS; BAPTIST GENERAL ASSOCIATION OF VIRGINIA; ADVENTIST LAYMEN'S FOUNDATION OF ARKANSAS; ADVENTIST

LAYMENS' FOUNDATION OF ARKANSAS; ADVENTIST LAYMENS' FOUNDATION OF MISSISSIPPI,

Appellants

v.

RONALD W. REAGAN, As President of the United States of America; UNITED STATES OF AMERICA; GEORGE P. SHULTZ, As Secretary of State; DEPARTMENT OF STATE; JAMES A. BAKER, As Secretary of the Treasury; DEPARTMENT OF THE TREASURY; and WILLIAM A. WILSON, as the United States Ambassador to the Holy See

(D.C. Civil No. 84-4476)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ and GIBBONS,
CIRCUIT JUDGES, AND GERRY, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 16, 1986.

On consideration whereof, it is now here ordered and adjudged this Court that the judgment of the said District Court, entered May 8, 1985, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ _____
Clerk

March 21, 1986

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*Hon. John Gerry, United States District Judge for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1309

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; *et al.*

Appellants

v.

RONALD W. REAGAN, As President of the United States of America, *et al.*

(D.C. Civil No. 84-4476)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ _____
Judge

Dated: April 25, 1986

IN UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 84-4476

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, ET AL.

v.

RONALD W. REAGAN, ET AL.

MEMORANDUM AND ORDER

FULLAM, J. FILED MAY 8, 1985

On January 10, 1984, the United States Department of State issued the following formal announcement:

> "The United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States of America, and Nunciature on the part of the Holy See, as of today, January 10, 1984."

President Reagan announced that he would nominate the Honorable William A. Wilson, who had been serving as his personal representative to the Vatican, as United States Ambassador to the Vatican; Mr. Wilson's nomination was confirmed by the Senate on March 7, 1984.

Plaintiffs, a group of 20 religious organizations and 12 of the officials of these organizations, together with some 71 individual members of the clergy of various denominations, have brought this lawsuit challenging the adoption and implementation of these arrangements, on a variety of constitutional grounds. The defendants have filed a Motion to Dismiss.

Plaintiffs assert four categories of claims, which may be summarized as follows:

1. By confirming the appointment of Ambassador Wilson and by providing funds to support his activities, Congress has violated the First Amendment because the arrangement (a) establishes a formal official relationship with a church, (b) amounts to a preference of one church over all other churches, (c) provides special benefits to one church to the detriment of all others, (d) produces excessive entanglement of the government in church affairs and vice-versa, and (e) creates religious divisiveness.

2. The President has exceeded his Article II powers, since the Holy See is a church, not a state; moreover, the President's actions contravene the First Amendment, for the reasons mentioned above.

3. The arrangement violates the Equal Protection Clause of the Fifth Amendment.

4. The defendants have violated the Constitution in various specific ways, including (a) supporting the Catholic Church, to the detriment of all others, (b) spending tax dollars for the benefit of the Catholic Church and its prelates, (c) supporting the Catholic Church in its efforts to counteract and nullify the influence of foreign missionaries allied with other churches, and (d) cooperating with the Catholic Church in investigating other United States religious organizations.

The defendants disagree with plaintiffs' constitutional arguments, but assert, preliminarily, that plaintiffs lack standing to bring this lawsuit, and that the court lacks subject-matter jurisdiction over these "political questions".

I. BACKGROUND

At the time of the American Revolution, and during the first several decades of our nation's history, what we now think of as the Vatican or the Holy See included the Papal States, an area of some 16,000 square miles with a population in excess of 3 million, whose temporal as well as spiritual ruler was the Pope. Amicable commercial relationships between the Papal States

and this country were established shortly after the end of the Revolutionary War. A United States consul was appointed in 1797; he and his successors apparently derived their financial support from consular fees.

In 1847, at the request of President Polk, Congress authorized the opening of formal diplomatic relations with the Papal States, and provided funding for a charge' d'affaires. The first such official was appointed, with the advice and consent of the Senate, in 1848.

In 1867, while Congress was considering the diplomatic and consular appropriation bill, questions were raised concerning whether the Vatican permitted Protestant church service to be conducted at the American Embassy in Rome; whereupon, Congress duly enacted a provision to the effect that "no money hereby or otherwise appropriated shall be paid for the support of an American legation at Rome, from and after the 30th day of June, 1867." Attempts to restore funding proved unsuccessful.

In 1870, the Italian government annexed the Papal States, and the status of the Vatican/Holy See/Roman Catholic Church as a territorial entity remained a matter of dispute and uncertainty until February 11, 1929, when the Lateran Treaty between the Holy See and the Italian government became effective. This treaty created the "State of the City of the Vatican", and, in return, the Holy See renounced its claims to the territory previously encompassed in the Papal States. Vatican City includes about 108 acres (approximately one-sixth of a square mile) of territory, with a permanent population of approximately 1,000. It is the world headquarters of the Roman Catholic Church.

Beginning in 1939, presidents of the United States have exchanged personal representatives with the Vatican. In 1951, President Truman sought to appoint an ambassador to the Holy See, but the proposal generated controversy, and was withdrawn in 1952. In 1970, President Nixon appointed Henry Cabot Lodge as his personal representative. As in the case of his predecessors, Mr. Lodge's appointment did not require

senatorial approval or congressional funding. Every president since then has appointed a personal representative to the Vatican. Mr. Wilson, whose appointment as ambassador is challenged in the present litigation, was serving as President Reagan's personal representative from 1981 until his appointment as ambassador.

In order to clear the way for the exchange of ambassadors, Congress had enacted P.L. No. 98-164, § 134, 97 Stat. 1029, on November 22, 1983, repealing the restriction against appropriations contained in the 1867 Act discussed previously.

Concomitantly with Ambassador Wilson's appointment, the Vatican sent a representative of equivalent rank (a Pro-Nuncio) to this country.

II. STANDING

The Constitution imposes limitations upon the judicial branch, as well as the other two branches. A court may exercise judicial power only at the instance of a litigant who has suffered, or is threatened with, legal injury. Such a litigant is said to have "standing" to seek judicial intervention. While judicial pronouncements on the subject of standing have not always been clear and consistent, recent decisions of the Supreme Court have removed much of the uncertainty surrounding the development of standing doctrine, and provide clear answers to the questions of standing involved in the present case.

In combination, the decisions in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1981), *Flast* v. *Cohen*, 392 U.S. 83 (1968), *Schlesinger* v. *Reservist Committee to Stop the War*, 418 U.S. 208 (1974), and *U.S.* v. *Richardson*, 418 U.S. 166 (1974) establish the following principles: (1) a taxpayer, as such, may have standing only to challenge actions by Congress in the exercise of its taxing and spending power under Article I, § 8 of the Constitution; (2) a litigant has no standing to complain about actual or threatened violations of the Constitution, by any

branch of the government, unless such violation directly injures that litigant, as distinguished from the public at large; and (3) there is no relaxation of standing requirements merely because violations of the First Amendment are alleged. In short, a citizen does not have standing to litigate alleged violations of the Establishment Clause merely because of an interest in achieving a just society in which church-state separationist values are preserved. It was that precise issue which divided the Court in *Valley Forge Christian College, supra;* needless to say, this court is obliged to follow the majority opinion in that case.

Plaintiffs have tried valiantly to identify particularized injury-in-fact in this case, but the effort has failed. Specifically, they claim: (1) that they are being denied equal access to the Executive Branch of government, in that the unique, continuing relationships resulting from the ambasadorial appointment will not be available to the plaintiffs or their organizations. (2) The spiritual and moral teachings of the Catholic faith, plaintiffs assert, will be thrust into the public limelight and the political arena in a manner not available to other religions. (3) The Catholic Church will be better able to compete in the religious market-place, with corresponding loss of membership and revenue for other religious denominations, because of the actual or symbolic preference Mr. Wilson's appointment connotes. (4) The Papal Nuncio and other Vatican representatives are clergymen; they are being granted diplomatic privileges and immunities not available to the clergy of other faiths. (5) Plaintiffs' religious beliefs and religious institutions are stigmatized because the formalization of diplomatic relations with the Vatican makes it appear that the Catholic Church is more important than other denominations. (6) The establishment of diplomatic relations with the Vatican will have an impact on government policies, and plaintiffs and members of their congregations will be subjected to subtle, indirect pressures to conform to such government policies, even though such policies may be contrary to their spiritual and moral beliefs and practices. And (7) the Catholic plaintiffs' (there are

several) "free-exercise" rights are being invaded, in view of the potential for governmental intrusion into the internal affairs of the Catholic Church.

These alleged injuries, in my view, amount to nothing more than a statement of some of the reasons why the separation of church and state is a good idea. These plaintiffs do not differ, in any significant respect, from the vast majority of Americans who support the principles of the First Amendment. But this, under the teaching of *Valley Forge Christian College, supra,* does not entitle them to litigate the alleged First Amendment violation. Persons who hold strong views on the subject of school prayer, for example, are not entitled to call upon the courts for relief unless they or their own children attend the schools in question and are directly affected by the practice. *Doremus* v. *Board of Education of Borough of Hawthorne*, 342 U.S. 429 (1952).

Plaintiffs do not allege that the actions now challenged have caused a decline in the membership or revenues of any of the plaintiffs' denominations or organizations, and any such assertion would be patently frivolous. Neither is there any allegation that the Catholic Church has been interfered with by our government, or that any of the plaintiffs or their organizations have been required to pursue objectionable policies or goals. All that is alleged is that plaintiffs believe that the challenged actions may create a climate in which these dire consequences will be more likely to occur. But that, quite obviously, does not amount to particularized injury-in-fact, under the authorities cited above.

I conclude that this action must be dismissed because plaintiffs lack standing to pursue it.

III. POLITICAL QUESTION

In no area of governmental activity is judicial intervention less likely to be permissible than in the President's conduct of foreign policy.

> "The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities or responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago and Southern Airlines* v. *Waterman Steamship Co.*, 333 U.S. 103, 111 (1948).

Every one of plaintiffs' contentions in this litigation is based upon the premise that "the Vatican" or the "Holy See", with which the exchange of ambassadors has occurred, is essentially a church rather than a state, or, at least, that it is a church-state whose churchly attributes far outweigh its secular attributes. The record provides considerable support for the proposition that the Vatican/Holy See views itself in that light. But this does not mean, of course, that the government of the United States is obliged to regard the Vatican/Holy See as primarily a church rather than a state. Whatever the correct analysis, the authority to conduct it rests with the Executive Branch, not this court.

> "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co.* v. *U.S.*, 304 U.S. 126, 137 (1938).

Moreover,

> "The authority of the political department is not limited, however, to the determination of the government to be recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President's determination of the government 'as well as to the underlying policy' must be addressed to the political department." *U.S.* v. *Pink*, 315 U.S. 203, 207 (1942).

It is unnecessary to decide whether the Constitution would be violated were the President to establish formal diplomtic relations with a church *qua* church, and I express no view on that subject. It is enough, for present purposes, to express my firm conclusion that this court is not empowered to pass judgment on the accuracy of the President's characterization of the nature of the entity with which diplomatic relations are established.

IV. THE AMENDED COMPLAINT

Plaintiffs filed their Complaint in this action on September 19, 1984. The defendants responded with a Motion to Dismiss, and plaintiffs were granted an extension of time for filing their response to the motion.

Although the original Complaint included class-action allegations, plaintiffs' counsel perceived that there had been inadequate compliance with this Court's Local Rules pertaining to class actions. Accordingly, on December 20, 1984, plaintiffs filed a motion for leave to amend their Complaint, so as to bring it into compliance with the local rule; at the same time, plaintiffs requested an extenion of time for obtaining formal certification of the class action, until after the court had ruled on the pending motion to dismiss. Both applications were granted.

Plaintiffs' memorandum in opposition to the Motion to Dismiss (119 pages, plus numerous exhibits) was filed January 14, 1985. Reply memoranda, supplemental memoranda, etc., were filed thereafter, and oral argument was scheduled for March 15, 1985, at 9:30 a.m. Late in the afternoon of March 14, 1985, plaintiffs filed their "First Amended Complaint". In addition to the purely formal amendments the plaintiffs had originally proposed, this document makes numerous substantive changes in plaintiffs' allegations and claims. It is clear that plaintiffs had the right to file an amended complaint, without obtaining leave of court, since the defendants had moved to dismiss, rather than responding on the merits. On the other hand, after they

obtained permission to file a specific amendment to the Complaint, and permitted their adversaries to proceed on the assumption that that was the only change contemplated, plaintiffs' eleventh-hour amendment falls outside the bounds of acceptable advocacy.

Although, as a result of the substantive changes in plaintiffs' pleadings, the briefs of all parties are slightly off-target in some respects, I have concluded that the First Amended Complaint does nothing to overcome the plaintiffs' lack of standing or the non-justiciability of the controversy. Since the Amended Complaint presumably reflects everything the plaintiffs can muster in response to the Motion to Dismiss, no useful purpose would be served in permitting further amendments.

V. CONCLUSION

Plaintiffs' Complaint and plaintiffs' First Amended Complaint will be dismissed, with prejudice, on the grounds that (1) plaintiffs lack standing, and (2) the controversy is not justiciable.

IN UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 84-4476

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, ET AL.

v.

RONALD W. REAGAN, ET AL.

ORDER

AND NOW, this 7th day of May, 1985, upon consideration of defendants' Motion to Dismiss and plaintiffs' response, it is ORDERED:

That plaintiffs' Complaint and plaintiffs' First Amended Complaint are DISMISSED, WITH PREJUDICE.

/s/ _____
J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 84-4476

FIRST AMENDED COMPLAINT

CLASS ACTION

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ROBERT L. MADDOX, individually and as Executive Director of Americans United for Separation of Church and State; AMERICAN BAPTIST CHURCHES IN THE U.S.A.; ROBERT C. CAMPBELL, individually and as General Secretary of the American Baptist Churches in the U.S.A.; AMERICAN COUNCIL OF CHRISTIAN CHURCHES OF CALIFORNIA; EDGAR R. KOONS, individually and as President of the American Council of Christian Churches of California; AMERICAN HUMANIST ASSOCIATION; FREDERICK EDWORDS, individually and as Executive Director of the American Humanist Association; CHURCH OF THE BRETHREN; ROBERT W. NEFF, individually and as General Secretary of the Church of the Brethren; COUNCIL ON RELIGIOUS AND CIVIL LIBERTY; INSTITUTE OF WOMEN TODAY; THE NATIONAL ASSOCIATION OF EVANGELICALS; BILLY A. MELVIN, individually and as Executive Director of the National Association of Evangelicals; NATIONAL ASSOCIATION OF LAITY; JOSEPH T. SKEHAN, individually and as President of the National Association of Laity; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.; BISHOP PHILIP COUSIN, individually and as President of the National Council of the Churches of Christ in the U.S.A.; THE NATIONAL COALITION OF AMERICAN NUNS; OHIO ASSOCIATION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; G. WEIR HARTMAN, individually and as Executive DIRECTOR OF OHIO ASSO-

CIATION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; PRESBYTERIAN CHURCH (U.S.A.); PROGRESSIVE NATIONAL BAPTIST CONVENTION, INC.; C.J. MALLOY, JR., individually and as General Secretary of the Progressive National Baptist Convention, Inc.; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALISTS FOR RELIGIOUS FREEDOM; KEN GJEMRE, individually and as Chair of Unitarian Universalists for Religious Freedom; HIGH WOODS REFORMED CHURCH; RIGHT REV. H. COLEMAN MCGEHEE, JR.; JAMES MANKIN; GARY M. BEAUCHAMP; GASTON D. COGDELL; P.D. WILMETH; J.P. SANDERS; JAMES J. BROWN; W.L. LUMPKIN; ROBERT D. HUGHES; ROBERT A. PARKER; ALTON H. MCEACHERN; E. MALLARY BINNS; JAMES A. LANGLEY; MALCOM G. LUNCEFORD; CHARLES H. ASHCRAFT; RUDY A. PULIDO; C. WELTON GADDY; IRA H. PEAK, JR.; JAMES LEO GARRETT, JR.; PAUL GRIFFIN JONES II; LEON HYATT, JR.; PHIL DOWELL STRICKLAND; RABBI BALFOUR BRICKNER; LARRY L. LEWIS; BERNARD F. DIDIER; JAMES P. ARCHIBALD; WILLIAM V. WIIST; R. LEE KRETZ; MITCHELL A. TYNER; WILLIS ADAMS; EDWIN E.G. SHAFER; GORDON W. ZUTZ; EDD DOERR; DAVID D. VAN STRIEN; THEODORE A. WEBB; JAMES F. HORNBACK; DAVID M. HOWARD; L.J. PETERSON; RONALD B. FLOWERS; NORMAN J. BAUER; FRED SCHWENGEL; GLEN A. HOLMAN; AUGUSTA P. FINKELSTEIN; CAROLYN E. MORGAN; MARY LEE S. O'NEAL; MARY BETH BECK; WALTER B. PONTYNEN, JR.; JAMES C. WEYDERT; LYNN L. WEYDERT; MICKIE L. WEYDERT; BERNICE G. GEORGE; BARBARA MOON; WILBUR F. HERMANCE; FLORIDA S. ESCHENBACH; JEWEL E. MORRISON; STEWART M.L. POLLARD; WENDELL PHILLIPS BERWICK; C.R. DALEY; CHARLES H. SUMNER; LEA W. CLAYTON, JR.; ALBERT R. DILLEY; FRANCIS W. HENSLEY; ROBERT R. TILITZ; MARIO CUNIBERTI; JAMES T. MCCOLLUM; W.B. TICHENOR; CAROLINA C.

CAPISTRANO; ALVIN W. STUART; JOHN V. STEVENS, SR.; HARRY F. MICHAELS; BAPTIST GENERAL ASSOCIATION OF VIRGINIA; ADVENTIST LAYMENS' FOUNDATION OF ARKANSAS; ADVENTIST LAYMENS' FOUNDATION OF MISSISSIPPI,

Plaintiffs,

v.

RONALD W. REAGAN, as President of the United States of America; UNITED STATES OF AMERICA; GEORGE P. SHULTZ, as Secretary of State; DEPARTMENT OF STATE; JAMES A. BAKER, III as Secretary of the Treasury; DEPARTMENT OF THE TREASURY; and WILLIAM A. WILSON, as the United States Ambassador to the Holy See,

Defendants.

Come now plaintiffs and for their First Amended Complaint allege as follows:

I.

JURISDICTION

1. This is a civil action brought by the plaintiffs for declaratory and injunctive relief against defendants for actions taken by the United States Congress to provide for the establishment of United States diplomatic relations with the Holy See, the recognition of diplomatic relations between the United States of America and the Holy See, the appointment of an ambassador to the Holy See, the funding of the diplomatic mission to the Holy See, and to declare such actions violative of the First and Fifth Amendments to the United States Constitution.

2. Jurisdiction is conferred upon this court pursuant to Title 28, U.S. Code, §§ 1331, 2201, and 2202.

3. The amount in controversy in this suit, exclusive of interests and costs, is in excess of $10,000 and more fully appears hereinafter. This action arises under the Constitution,

laws, or treaties of the United States. It is an action brought against the United States, agencies thereof, and officials of the United States in their official capacities.

II.

PLAINTIFFS

4. Plaintiff Americans United for Separation of Church and State, hereinafter referred to as "Americans United," is a nonprofit corporation organized and existing pursuant to the provisions of § 29-604 of the Code of the District of Columbia and is organized and formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. Americans United is governed by a Board of Trustees composed of religious leaders within many religious organizations, as well as individuals who are members of no religious body who are concerned with the preservation of the separation of church and state.

5. Plaintiff Robert L. Maddox is the Executive Director of Americans United and is an ordained Southern Baptist minister. From 1979 to 1980 he served as Special Assistant for Religious Liaison under President James Earl Carter.

6. Plaintiff American Baptist Churches in the U.S.A., hereinafter sometimes referred to as the "American Baptist Churches," is a religious denomination headquartered at Valley Forge, Pennsylvania, and is thus the principal office of the American Baptist Churches in the U.S.A., which is a nonprofit corporation located within this judicial district. The said American Baptist Churches have 5,817 local churches with a membership of 1,607,541. The American Baptist Churches also have 6,843 ordained clergy.

The American Baptists' work at the local level dates back to the organization by Roger Williams of the First Baptist Church in Providence, Rhode Island in 1638. The American Baptist Churches in the U.S.A. has a mandate from its Board to speak

whenever Baptist principles are involved. The preservation of religious liberty is a tenet of the Baptist religious belief, and the principle of separation of church and state is basic to the Baptist principles of religious liberty. The administrative function of the church is conducted through the office of the General Secretary.

7. Plaintiff Robert C. Campbell is an ordained minister of the American Baptist Churches in the U.S.A. and is General Secretary of the American Baptist Churches in the U.S.A. This plaintiff resides within this judicial district.

8. Plaintiff American Council of Christian Churches of California is an organization of approximately 85 churches of various denominations (predominantly Baptist, Methodist, and Presbyterian) located in the State of California which hold to the fundamentalist doctrines of the faith with its headquarters located in Orangevale, California.

9. Plaintiff Edgar R. Koons is an ordained Baptist minister and President of the American Council of Christian Churches of California. He is also Pastor of the Hazel Avenue Baptist Church located in Fair Oaks, California.

10. Plaintiff American Humanist Association is a religious denomination with a membership of over 3,000 and 157 certified clergy. Its national headquarters is located in Amherst, New York.

11. Plaintiff Frederick Edwords is a certified clergyman and is the Executive Director of the American Humanist Association.

12. Plaintiff Church of the Brethren is a religious organization with 170,267 members and has 1,912 ordained clergy ministering in 1,064 churches. The Church of the Brethren traces its heritage to the German Pietist-Anabaptist movement and was founded in 1708 in Germany and came to the United States in 1719. Its headquarters is in Elgin, Illinois.

13. Plaintiff Robert W. Neff is General Secretary of the Church of the Brethren.

14. Plaintiff Council on Religious and Civil Liberty is a nonprofit organization located in Sacramento, California, formed for the purpose of educating the general public about events and issues that impact on religious and personal freedoms. The directors and staff of this organization are lay members of the Seventh-day Adventist Church.

15. Plaintiff Institute of Women Today is a voluntary association of more than 100 professional women in law, religion, psychology, and history. It is sponsored by church-related Protestant, Catholic, and Jewish women's organizations.

16. Plaintiff National Association of Evangelicals represents more than 3 million conservative Protestants and 42 denominations. Within its membership it also represents individual colleges from 34 other denominations, as well as Bible Colleges, Christian schools, seminaries, ministerial fellowships, and evangelistic organizations. Fellowship is based upon a statement of faith that is descriptive of Bible believing evangelical Christians.

17. Plaintiff Billy A. Melvin is the Executive Secretary of the National Association of Evangelicals.

18. Plaintiff National Association of Laity is an association of 1,300 Catholic lay persons. It was established in 1967 to advocate liberal causes within the Catholic Church and "to expedite the carrying out of Vatican II mandates." The group favors reporting of income, budgets, and wealth by church officials, womens' ordination, optional clerical celibacy, and collective bargaining rights for people working in the church. The association seeks to abolish racism and sexism in the Catholic Church and opposes government funding of parochial schools. The group also favors freedom of choice on the issue of abortion.

19. Plaintiff Dr. Joseph T. Skehan is President of the National Association of Laity.

20. Plaintiff National Council of the Churches of Christ in the U.S.A., hereinafter referred to as "National Council of

Churches," is the cooperative agency of 31 Protestant and Eastern Orthodox national religious communions with an aggregate membership of over 40 million in the United States. Its headquarters is located in New York, New York.

21. Plaintiff Bishop Philip Cousin is a Methodist Bishop and President of the National Council of Churches.

22. Plaintiff National Coalition of American Nuns is an organization of approximately 2,000 Roman Catholic nuns dedicated to studying, working, and speaking out on issues related to human rights and social justice.

23. Plaintiff Ohio Association for Public Education and Religious Liberty is an association of Ohio citizens dedicated to maintaining church-state separation.

24. Plaintiff G. Weir Hartman is Executive Director of the Ohio Association for Public Education and Religious Liberty and an ordained minister of the United Methodist Church.

25. Plaintiff Presbyterian Church (U.S.A.) is a national Christian denomination with churches in 50 states. It was formed June 10, 1983, through a merger of the United Presbyterian Church in the U.S.A. and the Presbyterian Church in the United States. It has over 3 million active members and more than 12,000 local congregations with a clergy in excess of 21,000. The church maintains an ecumenical outlook and is a constituent member of the National Council of Churches of Christ in the U.S.A.

26. Plaintiff Progressive National Baptist Convention, Inc. was founded in 1961 in Philadelphia and represents 1,200,000 church members in 1,600 churches. It also has over 1,000 ordained ministers.

27. Plaintiff C.J. Malloy, Jr. is the General Secretary of the Progressive National Baptist Convention, Inc.

28. Plaintiff Unitarian Universalist Association is a religious organization which combines two traditions: the Universalists who organized in 1793, and the Unitarians who

organized in 1825. They merged into the Unitarian Universalist Association in 1961. Both groups trace their roots on this continent to the early Massachusetts settlers and to the founders of the Republic. Overseas, their heritages reach back further centuries to pioneers in England, Poland, and Romania. The offices of the Association are in Boston, Massachusetts.

29. Plaintiff Unitarian Universalists for Religious Freedom is an organization whose purpose is to advance the principles of religious and civil freedoms by strengthening the wall of separation between church and state with special emphasis on keeping the issue before the eyes and the consciousness of the Unitarian Universalist Association.

30. Plaintiff Ken Gjemre is Chair of plaintiff Unitarian Universalists for Religious Freedom.

31. Plaintiff High Woods Reformed Church is a congregation of the Reformed Church in America and is located in Saugerties, New York.

32. Plaintiff Right Rev. H. Coleman McGehee, Jr. is the Bishop of the Episcopal Diocese of Michigan and resides in Detroit, Michigan.

33. Plaintiff James Mankin is the Pastor of the Madison Church of Christ located in Nashville, Tennessee. Plaintiff Gary Beauchamp is the Pastor of the Highland Oaks Church of Christ located in Dallas, Texas. The Madison Church of Christ and the Highland Oaks Church of Christ are the two largest congregations of the Church of Christ in the world. Plaintiff J.P. Sanders is Dean and a member of the faculty of the Religion Department at George Pepperdine University in Malibu Beach, California. Plaintiff Gaston D. Cogdell is Pastor of the Clifton Church of Christ located in Cincinnati, Ohio. Plaintiff James J. Brown is the Pastor of the Church of Christ located in Sacramento, California. Each of the aforesaid plaintiffs is a pastor of the Church of Christ fellowship. Plaintiff P.D. Wilmeth is the Editor of Voice of Freedom, a monthly periodical circulated primarily among members of the Church

of Christ, and Pastor of the Hebron Parkway Church of Christ in Dallas, Texas.

The Churches of Christ are autonomous congregations whose members appeal to the Bible alone to determine matters of faith and practice. There are no central administrative offices or officers. Publications and congregations related to the church are either under local congregational control or independent of any one congregation. There are more than 2,600 congregations representing more than 1,250,000 believers in the United States.

34. Plaintiff W.L. Lumpkin is President of the Baptist General Association of Virginia, a religious community of over 600,000 members. He is also an ordained Southern Baptist minister and Pastor of the Freemason Street Baptist Church in Norfolk, Virginia. Plaintiff Robert D. Hughes is Executive Director-Treasurer of the Southern Baptist General Convention of California and resides in Fresno, California. Plaintiff Robert A. Parker is director of the Arkansas Christian Life Council and is an ordained Southern Baptist minister. Plaintiff Alton H. McEachern is Pastor of the First Baptist Church in Greensboro, North Carolina. Plaintiff E. Mallary Binns is an ordained Southern Baptist minister and resides in Falls Church, Virginia. Plaintiff James A. Langley is an ordained Southern Baptist minister and resides in Washington, D.C. Plaintiff Malcom G. Lunceford is an ordained Southern Baptist minister residing in Frankfort, Kentucky. Plaintiff Charles H. Ashcraft is a retired Southern Baptist pastor residing in El Paso, Texas. Plaintiff Rudy A. Pulido is an ordained Southern Baptist minister and Pastor of the Southwest Baptist Church located in St. Louis, Missouri. Plaintiff C. Welton Gaddy is Chaplain at Mercer University, a Southern Baptist institution of higher learning, located at Macon, Georgia. Plaintiff Ira H. Peak, Jr. is Director of the Department of Christian Moral Concerns, Missouri Baptist Convention, which is headquartered in Jefferson City, Missouri. Plaintiff James Leo Garrett, Jr. is Professor of Theology at Southwestern Baptist Theological Seminary which is affiliated with the Southern Baptist

Convention and is located in Fort Worth, Texas. Plaintiff Paul Griffin Jones, II is Executive Director-Treasurer of the Christian Action Commission of the Mississippi Baptist Convention with headquarters in Jackson, Mississippi. Plaintiff Leon Hyatt, Jr. is Church Extension Director of the Louisiana Baptist Convention and resides in Pineville, Louisiana. Plaintiff Phil Dowell Strickland is an attorney and Director of the Christian Life Commission of the Baptist General Convention of Texas with headquarters in Dallas, Texas.

35. Plaintiff Rabbi Balfour Brickner is a rabbi at the Steven S. Wise Free Synagogue located in New York City.

36. Plaintiff Larry L. Lewis is Senior Pastor of the First Presbyterian Church of Fort Myers, Florida. Plaintiff Bernard F. Didier is Pastor of the First Presbyterian Church of Deerfield, Illinois.

37. Plaintiff James P. Archibald is Pastor of the Good Shepherd United Methodist Church in Silver Spring. Maryland.

38. Plaintiff William V. Wiist is an ordained minister of the Seventh-day Adventist Church and resides in Burleson, Texas. Plaintiff Mitchell A. Tyner is a Seventh-day Adventist minister and an attorney residing in Silver Spring, Maryland. Plaintiff Willis Adams is a Seventh-day Adventist minister residing in Lima, Ohio. Plaintiff Edwin E.G. Shafer is a Seventh-day Adventist minister residing in Frankfort, Kentucky. Plaintiff Gordon W. Zutz is a Seventh-day Adventist minister residing in Henrietta, New York.

39. Plaintiff Edd Doerr is a certified clergyman and is Washington representative of the American Humanist Association.

40. Plaintiff David D. Van Strien is a Unitarian minister residingin Peterborough, New Hampshire. Plaintiff Theodore A. Webb is a retired Unitarian minister residing in Sacramento, California.

41. Plaintiff James F. Hornback is a pastor of the Ethical Society of St. Louis, Missouri.

42. Plaintiff David M. Howard is General Director of World Evangelical Fellowship located in Wheaton, Illinois.

43. Plaintiff L.J. Peterson is Administrator, Presbyterian Village, Birmingham, Michigan. Plaintiff Ronald B. Flowers is Professor of Religion at Texas Christian University, Fort Worth, Texas. Plaintiff Norman J. Bauer is Professor of Education at State University of New York, Geneseo, New York.

44. Plaintiff Fred Schwengel is a former member of the United States Congress residing in Arlington, Virginia.

45. Plaintiff Glen A. Holman is Director of the California Church Council, an organization of major Protestant churches in California headquartered in Sacramento, CA.

46. Plaintiff Augusta P. Finkelstein resides in New York City. Plaintiff Carolyn E. Morgan resides in Loomis, California. Plaintiff Mary Beth Beck resides in Boyds, Maryland. Plaintiffs Mary Lee S. O'Neal, Walter B. Pontynen, Jr., James C. Weydert, Lynn L. Weydert, Mickie L. Weydert, Bernice G. George, Carolina C. Capistrano, and Barbara Moon reside in Sacramento, California. Plaintiff William F. Hermance resides in Hilton, New York. Plaintiff Florida S. Eschenbach resides in Burlington, Kentucky. Plaintiff Jewel E. Morrison resides in Wheat Ridge, Colorado. Plaintiff Stewart M.L. Pollard resides in Silver Spring, Maryland. Plaintiff Wendell Phillips Berwick resides in Elmhurst, Illinois. Plaintiff C.R. Daley resides in Louisville, Kentucky. Plaintiff Francis W. Hensely resides in Eden Mills, Vermont. Plaintiff Robert R. Tilitz resides in Elmhurst, New York. Plaintiff Mario Cuniberti resides in Columbus, Ohio. Plaintiff James T. McCollum resides in Rochester, New York. Plaintiff Alvin W. Stuart resides in Levittown, Pennsylvania. Plaintiff John V. Stevens, Sr. resides in Thousand Oaks, California. Plaintiff Harry F. Michaels resides in Rochester, New York.

47. Plaintiff Baptist General Association of Virginia is affiliated wth the Southern Baptist Convention and is comprised of 1,458 churches with a membership of 586,752 within the State

of Virginia. The Baptist General Association of Virginia is headquartered at Virginia Beach, Virginia.

48. Plaintiff Adventist Laymens' Foundation of Arkansas is located at Russelville, Arkansas, and is comprised of laymen who are members of the Seventh-day Adventist Church located in the State of Arkansas.

49. Plaintiff Adventist Laymens' Foundation of Mississippi is an association of Seventh-day Adventist laymen located within the State of Mississippi.

50. Each of the individual plaintiffs named in this Complaint are citizens of the United States, pay taxes to the United States, and are qualified voters of the United States.

51. The organizational plaintiffs file this action on behalf of their organization and on behalf of their members. Each of the aforesaid individual plaintiffs, who are designated as a pastor, minister, rabbi, or clergyman of a specific religious organization, bring this action not only individually but as class representatives of, for, and on behalf of all other clergy of the religious organizations they serve. However, unless otherwise expressly stated, individual plaintiffs have not been authorized by their employing organizations to file this action on behalf of said organizations and do so only in their individual capacity.

III.

DEFENDANTS

52. Defendant Ronald W. Reagan is the President of the United States. Under Article II, section 2 of the Constitution, the President has been empowered to nominate, and with the advice and consent of the Senate, appoint ambassadors and other public ministers. Under Article II, section 3 of the Constitution, the President is empowered to receive ambassadors and other public ministers.

53. Defendant George P. Shultz is the duly appointed Secretary of State of the United States of America and as such is

the head of defendant Department of State which is an executive department of defendant United States of America.

54. Defendant James A. Baker, III is the duly appointed Secretary of the Treasury of the United States of America and as such is the head of defendant Department of the Treasury which is an executive department of the United States Government.

55. Defendant William A. Wilson was appointed by President Reagan to serve as Ambassador to the Holy See and is currently acting in that capacity.

56. The United States of America is also named as a defendant in this action.

IV.

CLASS ACTION ALLEGATIONS

57. This action may be maintained as a class action pursuant to Rule 23(b)(3) of F.R.Civ.P. since the questions of law and fact common to members of their class, as set forth above, predominate over questions affecting only individual members, and this class action is superior to all other available methods of fair and efficient adjudication of the controversy. This action may be maintained as a class action, pursuant to Rule 23(b)(3) since: (a) the size of the class, to wit: the religious organizations served by the pastors, ministers, rabbis or clergymen of specific religious organizations, who are named as individual plaintiffs herein as set forth and described in ¶¶5, 7, 9, 11, 13, 17, 19, 21, 24, 27, 30, 32-42 and 45 of this First Amended Complaint, are too numerous to name as individual plaintiffs; (b) those named as prospective class plaintiffs are religious leaders representative of their religious organizations they serve. Many of these individual plaintiffs have been selected by their church to serve in positions of church authority and reflect the concerns of the church on issues such as those raised in this litigation; (c) this is the first litigation concerning the controversy commenced by members of the class or sub-class; (d) it is

clearly desirable to concentrate the litigation of the claims contained herein in this form; and (e) there are no unresolved difficulties likely to be encountered in the management of this action as a class action.

58. The alleged questions of law and fact common to the class are: (a) whether the official recognition of the Holy See by the United States Government and the exchange of representatives at the diplomatic level between the United States of America and the Roman Catholic Church and the funding provided therefor is a violation of the First and Fifth Amendments to the United States Constitution; and (b) whether the relationship established violates the constitutional requirements of religious neutrality; and (c) whether the religious organizations which the individual plaintiffs serve and their membership have been injured as a result of the relationship established; and (d) whether the actions of the defendants in exercising the resultant authority provided to defendants as a direct consequence of such a diplomatice recognition and exchange of ambassadorial level representatives have also violated the First and Fifth Amendments to the United States Constitution; and (e) whether the religious organizations the individual plaintiffs serve and their membership have been injured as a result of the exercise of authority by defendants as a direct consequence of the diplomatic recognition, exchange of ambassadorial level representatives and funding.

V.

FACTUAL ALLEGATIONS

59. As early as 1779 John Adams wrote the Continental Congress that it was his desire that it would "never send a minister to His Holiness" or receive a Catholic nuncio to this country. On December 15, 1784, the Papal Nuncio, at Paris, France, contacted the American Commissioners informing the American Commissioners that his government, the Papal States, had agreed to open the ports of Civita Vecchia on the Tyrrhenian Sea and Ancono on the Adriatic to American ves-

sels. The Papal Nuncio expressed interest at that time that commercial relations be established between the Papal States and the new American nation.

60. On June 26, 1797, Giovanni Batista Sartori of Rome was commissioned as the first consul to represent the United States in the papal dominions. The Papal States, whose center was Rome and whose monarch was the Pope, were comprised of Romagna, the Marches, Umbria, and Rome, bounded on the north by the Lombardo-Venitian kingdom, on the east by the kingdom of Naples, on the southwest by the Mediterranean Sea, and on the west by Tuscany and the Duchy of Modena. The territory convered an area of approximately 16,000 square miles and had a population of more than three million. The American counsuls were paid by fees charged by the consul. The American representatives to the Papal States were explicitly restricted to "civil relations" and to the extension of commerce between the two countries. No representatives of the Papal States were correspondingly sent to the United States.

61. On December 7, 1847, President Polk, in a message to Congress, recommended the opening of formal diplomatic relations with the Papal States. This recommendation was included in a deficiency bill containing the financial provisions for a new charge' d'affaires. The proposal was vehemently debated in both houses of Congress, primarily on the grounds that there was no political or commercial need for such representation, and the President was pandering to the Catholic vote. However, the appropriation passed the House of Representatives 137 to 15 and the Senate 36 to 7. The first charge' d'affaires to the Papal States was appointed in 1848 with Congress having exercised its powers of advice and consent as well as its funding powers under Article I, section 8 of the Constitution. The United States diplomat was instructed by Secretary of State James Buchanan to "carefully avoid even the appearance of interfering in ecclesiastical questions." In 1854 Lewis Cass, Jr., the second charge' was raised to the rank of minister. In 1867 a question of religious liberty arose between the United

States and the Papal States. The controversy stemmed from the laws of Rome which prohibited any other form of public worship than such as conformed to the teachings of the Roman Catholic Church. Certain Protestant churches were required to maintain their churches outside of Rome.

62. On January 24, 1867, Rep. William E. Dodge of New York introduced a resolution requesting the President of the United States to communicate to the House of Representatives any information the government might receive concerning the removal of the Protestant church at the American Embassy from the City of Rome by order of the papal government. At this same time the House of Representatives had under consideration the diplomatic and consulor appropriation bill. Representative Thomas Wilson of Pennsylvania on January 30, 1867, moved to strike from the civil and diplomatic appropriation bill the items providing for the salary of the American minister in Rome. The legislative provision specifically provided "[a]nd no money hereby or otherwise appropriated shall be paid for the support of an American legation at Rome, from and after the 30th day of June, 1867." Congress adopted the resolution cutting off appropriations for this diplomatic mission. In diplomatic correspondence from William H. Seward, Secretary of the Department of State, to Mr. Rufus King, the United States minister to the Papal States, dated April 20, 1867, Secretary Seward notified Mr. King as follows:

> Sir: You have already been informed that a law has been enacted by Congress which declares that from and after the 30th day of June next no more money shall be paid to the legation at Rome. This law leaves your mission still existing, but without compensation after that period.
>
> You will be at liberty, under the circumstances, to consult your own feelings and interests, either to remain at Rome, in charge of the legation, after the 30th day of June, without compensation or provision for your expenses, or to resign, or to leave Rome without resigning on leave of absence, but in every case without compensation, whether remaining in Europe or returning here.

> Should you decide withdrawing from Rome, you are at liberty to do so at any time before or after the 30th of June. Whenever you may have prepared to withdraw from that capital, you will place the archives in the care of the counsul at that place taking the proper vouchers therefor, and you will inform the cardinal secretary of state of that proceeding. You will need to give him no further explanation, although you are entirely at liberty to communicate the contents of this instruction.

Annexed hereto and made a part hereof by reference and marked Exhibit A is a copy of said letter.

63. Two attempts were thereafter made by several members of Congress in 1869 and again in 1870 to re-establish diplomatic relations with the Papal States. On January 6, 1869, a debate took place in the House of Representatives on the question of the mission to the Papal States when James Brooks of New York asked Elihu B. Washburne of Illinois, Chairman of the House Appropriations Committee, why the amount of money appropriated for the consulor and diplomatic expenses had been reduced by $7,025. The reply was that the mission located at Rome, which originally had been included, was left out. Thereupon, Congressman Brooks moved that the mission to Rome be inserted and an appropriation of $7,500 be made therefor. Brooks' amendment, however, failed 82 to 31.

64. The second and final effort to reopen the United States mission to the Papal States occurred on May 19, 1870, when the House took up the diplomatic and consulor appropriations bill in the committee of the whole. At that time Representative Brooks of New York moved to strike out the appropriation for a minister to Guatemala and to insert Rome. This motion, however, was defeated 71 to 47. During the period of time from 1868 to 1870, there was substantial political-religious debate and controversy surrounding the cutting off of formal diplomatic relations with the Papal States, as well as the attempts to restore the congressional funding for the diplomatic missions. Even Catholics were divided as to advisability of continuing the American diplomatic mission to Rome. In 1870 Monsignor

Robert Seton, Prothonotary Apostolic, expressed the view of a large number of Catholics that "the United States minister of Rome is tantamount to a Protestant spy at the papal court." At the same time American Protestants were protesting any further diplomatic involvement even with the Papal States where the primary responsibility and role of the mission related to commercial and tourist interests. At that time, those opposing the reviving of the mission to Rome pointed out that there was little reason for the continuation of such mission due to the lack of commerce with Rome. Protestants opposed any reviving of the diplomatic mission due to the church-state controversy that raged as a result of the previous diplomatic mission.

65. Any further attempt at reviving the diplomatic mission came to an end on September 20, 1870, when the kingdom of Italy annexed the Papal States. In 1871 the Italian Parliament passed the Law of Guarantee to prevent the Pope from being merely an Italian citizen and the Holy See from coming under the territorial supremacy of Italy. During the period from 1870 until February 11, 1929, the Roman Catholic Church did not exist as a separate state but was a private ecclesiastical entity without territorial pretensions.

66. On February 11, 1929, the Lateran Treaty was entered into between the Holy See and the Italian government. This treaty recognized the State of the City of the Vatican. In the Lateran Treaty the Holy See renounced its claims to the territory of the Papal States.

67. The State of the City of the Vatican is comprised of just 108 acres or about one-sixth of a square mile of territory in the City of Rome. The Vatican legal system is based upon the Roman Catholic Church's Code of Canon Law and on the statutes promulgated by the Pope. Some of its day-to-day administrative activities are carried out by the College of Cardinals. Its population is slightly in excess of 1,000. The Vatican is the world headquarters of the Roman Catholic Church and exists to serve as the spiritual and administrative headquarters of the church.

68. On December 24, 1939, Pope Pius XII and President Franklin D. Roosevelt announced the exchange of a personal representative between the United States and the Vatican. Myron C. Taylor held the position as "Personal Representative" of the President under President Roosevelt and President Truman. He continued to serve in this capacity until 1949 when he retired. The appointment, however, of Myron C. Taylor was made without the consent of the Senate and carried with it no appropriation by Congress. No congressional act was thus involved.

69. In 1951 President Harry Truman nominated General Mark Clark as Ambassador to the Holy See. Plaintiff Americans United for Separation of Church and State opposed such an appointment. Plaintiff National Association of Evangelicals called on its 8,000 pastors to fight the nomination, and a multitude of other organizations spoke out against the appointment as a violation of church-state separation. Plaintiff National Council of Churches, by action of its General Board on January 17, 1951, adopted a policy statement opposing the appointment of an ambassador to the Vatican; a copy of this board action is annexed hereto, made a part hereof by reference, and marked Exhibit B. A second policy statement was adopted by the General Board of the National Council of Churches on October 31, 1951, a copy of which is annexed hereto, made a part hereof by reference, and marked Exhibit C. This latter policy was reaffirmed by the General Assembly, a body of 750 members, on December 12, 1952, and was reaffirmed by the General Board on March 17, 1954, and remains the present policy of the National Council of Churches. A condition of national religious divisiveness was the outgrowth of the presidential appointment. On January 13, 1952, President Truman withdrew General Clark's appointment.

70. In 1970 President Richard Nixon named Henry Cabot Lodge as his personal representative to Pope Paul VI. The appointment did not require or receive senatorial approval or congressional funding. At this time there was a substantial amount of opposition from Protestant organizations and again

religious discord followed the action by the President. Personal representatives have been appointed by Presidents since that time until the recent appointment.

71. In March of 1981, President Reagan appointed William A. Wilson to serve as the President's representative to Pope John Paul II. Mr. Wilson served in this capacity until his appointment while the Holy See maintained Archbishop Pio Laghi, the Apostolic Delegate to the U.S. Catholic Church, as its unofficial diplomatic representative in Washington.

72. In the early part of 1983 a legislative measure "providing for the establishment of the United States diplomatic relations with the Vatican" was introduced in the Senate by Sen. Richard G. Lugar of Indiana as S. 1757 and in the House of Representatives by the late Rep. Clement J. Zablocki of Wisconsin as H.J. Res. 316. No public hearing was held on these legislative items. Senator Lugar then, on September 22, 1983, introduced legislation in the form of an amendment to the 1984 State Department Authorization Bill as Amendment No. 2189 which read as follows:

> On page 24, line 20, immediately following sec. 121, insert the following new section
>
> "The United States diplomatic relations with the Vatican
>
> "Sec. 122. In order to provide for the establishment of United States diplomatic relations with the Vatican. The Act entitled "an Act Making Appropriations for the Consular and Diplomatic Expenses of the Government for the year ending thirtieth June, 1868, and for other purposes," approved February 28, 1867, is amended by repealing the following sentence (14 Stat. 413): "And no money hereby or otherwise appropriated shall be paid for the support of an American legation at Rome, from and after the thirtieth day of June, 1860-7."

The legislation was approved by the House-Senate Conference Committee and by the full House and Senate and subsequently signed into law by the President as Pub. L. No. 98-164 on November 22, 1983.

73. Following the bill's approval the State Department began consulting with respresentatives of the Holy See on the question of closer relations. On January 10, 1984, the White House and the Holy See announced the establishment of full diplomatic relations at the ambassadorial level. The formal announcement issued by the United States Department of State reads as follows:

> The United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States of America, and nunciature on the part of the Holy See, as of today, January 10, 1984.

President Reagan announced that he would nominate Mr. Wilson as U.S. Ambassador to the Vatican.

74. The term "Holy See" is an ecclesiastical one and has been defined in the *New Catholic Encyclopedia* as follows:

> HOLY SEE, a term designating Rome as the bishopric of the pope. The word is derived from the Latin *sedes*, which denotes the seat or residence of the bishop: this is because the bishop's office is symbolized by the chair in which he presides over his people. The word see is accordingly applied to all bishoprics, although it was first used of the Churches founded by Apostles. They would be known further as apostolic or holy see, in as much as it was the function of the apostles to mediate Christ's holiness to their flocks. As the titles pope and apostolic see came to be used especially of the bishop of Rome and his see, so too the title holy see was restricted to Rome. In canonical and diplomatic language it now refers to Rome as the bishopric of the pope and to his Curia, the Roman Congregations, tribunals, and offices.

75. On February 2, 1984, the Senate Committee on Foreign Relations held a hearing on the nomination of William A. Wilson as Ambassador to the Holy See. Since no hearing had been held previously concerning Congress' earlier repeal of the prohibition against funding such a diplomatic mission, the

Committee on Foreign Relations permitted testimony to be given, not only concerning the appointment of William A. Wilson as Ambassador to the Holy See, but also with reference to the appointment of any ambassador to the Holy See. Statements of opposition were submitted on behalf of the Baptist Joint Committee on Public Affairs, the National Council of Churches of Christ, the General Conference of Seventh-day Adventists, Americans United for Separation of Church and State, and the Southern Baptist Convention. Included in the statements of Dr. James T. Draper, President of the Southern Baptist Convention, were copies of resolutions opposing the appointment of the United States Ambassador to the Vatican by the Arkansas Baptist State Convention, the District of Columbia Baptist Convention, Kentucky Baptist Convention, Louisiana Baptist Convention, Baptist Convention of Maryland, Mississippi Baptist Convention, Missouri Baptist Convention, Southern Baptist Foreign Mission Board, and Texas Baptist Christian Life Commission. In addition, twenty Southern Baptist national agencies voted their unanimous opposition to this matter, and all fifteen living former presidents of the Southern Baptist Convention, as well as the then President of the Southern Baptist Convention, signed a letter protesting the action and sent it to President Reagan.

76. On the 7th day of March, 1984, the Senate confirmed the appointment of William A. Wilson as Ambassador to the Holy See.

77. Funds for the United States mission at the Holy See were reprogrammed by Congress, and additional moneys were thus made available for the funding of the diplomatic mission to the Holy See and the expenses of the United States Ambassador to the Holy See. Annual appropriation of funds by Congress will be required to maintain the diplomatic mission to the Holy See.

78. Contrary to various public statements that were made at the time of the establishment of relations with the Holy See, the exchange of ambassadors contemplated was not with the

State of the City of the Vatican, but rather was with the Holy See. This was confirmed by an address of Archbishop Pio Laghi, Apostolic Pro-Nuncio in the United States, at The Catholic University of America, Washington, D.C., on April 6, 1984, wherein Archbishop Pio Laghi stated:

> Papal diplomacy has been referred to as *sui generis* because nowhere is it exactly paralleled. In fact, the Catholic Church is the only religious body that I know of that engages in direct relations with various states. You recall the confusion and controversy that arose in the media at the time it was announced that the United States and the Holy See intended to re-establish diplomatic ties. Some mistakenly tried to justify the American government's action by implying that it was entering into a diplomatic relationship not with the Roman Catholic Church as such, the Holy See, but rather with the sovereign Vatican City-State.
>
> > Papal Diplomacy rests essentially upon the spritual sovereignty of the Holy See and not upon dominion over a few acres in the heart of Rome. (R.A. Graham, S.J., *Vatican Diplomacy*, p. 15).
>
> It is, therefore, the Pope's religious authority which confers upon him the classical right of legation, a diplomatic standing in the world. Those who interpret Papal Diplomacy as emanating from the Pope's temporal sovereignty are failing to understand the true nature of the mission of the Holy See. [See Exhibit D at pp. 2-3]

A copy of this address is annexed hereto and made a part hereof by reference and marked Exhibit D.

79. The Pro-Nuncio's statement above-referred to is consistent with the official pronouncements of the Roman Catholic Church. Pope Paul VI, in his June 24, 1969, statement "On Papal Diplomats," issued norms regarding the office and the functions of pontified representatives which include the following statements:

> **Article I**
>
> 1) By the term of pontifical representatives, those ecclesiastics—usually endowed with episcopal dignity—are

here designated as those who receive from the Roman Pontiff the charge of representing him in a fixed way in the various nations or regions of the world.

2) They exercise the pontifical legation either only in connection with the local churches or jointly with the local churches and the states and respective governments. When their legation is only to the local churches, they are known as apostolic delegates. When to this legation, of a religious and ecclesial nature, there is added the diplomatic legation to states and governments, they receive the title of nuncio, pronuncio and internuncio, according as to whether they have the title of "ambassador" with or without the title of "dean" of the diplomatic corps, or if they have the grade of "extraordinary envoy and minister plenipotentiary."

3) The pontifical representative proper can, owing to special circumstances of time and place, be designated by other names such as for instance "apostolic delegate and envoy of the Holy See to a government." In addition there is the case of a pontifical representation being entrusted in a fixed but supplementary way to a "reagent" or to a "charge' d'affaires with credentials."

* * *

Article IV

1) The primary and specific purpose of the mission of the pontifical representative is to render ever closer and more operative the ties that bind the Apostolic See and the local churches.

2) He furthermore interprets the solicitude of the Roman pontiff for the good of the country in which he exercises his mission. In particular, he must concern himself zealously with the problems of peace, of progress and of the collaboration of the peoples in view of the spiritual, moral and material good of the entire human family.

3) Upon the pontifical representative also falls the duty of safeguarding, in cooperation with the bishops, among the civil authorities of the territory in which he exercises his office, the mission of the Church and of the Holy See.

This is also the task of those pontifical representatives who have no diplomatic character; they will have care, however,

to entertain friendly relations with these same authorities.

4) In his capacity of envoy of the supreme shepherd of souls, the pontifical representative will promote, in accordance with the instructions he receives from the competent offices of the Holy See and in agreement with the local bishops and particularly with the patriarchs in Eastern territories, opportune contacts between the Catholic Church and the other Christian communities and will favor cordial relations with the non-Christian religions.

5) The manifold mission of the pontifical representative is pursued under the guidance and according to the instructions of the cardinal secretary of state and prefect of the Council for the Public Affairs of the Church, to whom he is directly responsible for the execution of the mandate entrusted to him by the supreme pontiff.

Article V

1) The ordinary function of the pontifical representative is to keep the Holy See regularly and objectively informed about the conditions of the ecclesial community to which he has been sent, and about what may affect the life of the Church and the good of souls.

2) On the one side, he makes known to the Holy See the thinking of the bishops, of the clergy, of the Religious and of the faithful of the territory where he carries out his mandate, and forwards to Rome their proposals and their requests; on the other side, he makes himself the interpreter with those concerned of the acts, documents, information and instructions emanating from the Holy See.

3) Therefore, no office or dicastery of the Curia will omit to communicate to him decisions taken, and generally will make use of his good offices to make them reach their destination; in addition, they will ask for his opinion regarding acts and measures to be adopted in the territory in which he fulfills his mission.

* * *

Article X

1) Relations between the Church and the state are normally cultivated by the pontifical representative, to whom

the task is entrusted, proper and particular, of acting in the name of the Holy See:

a) In order to promote and favor its relations with the government of the nation to which he is accredited;

b) To treat questions concerning relations between Church and state;

c) To concern himself particularly with the stipulation of "modus vivendi" of agreements and concordats, as well as of conventions referring to questions within the sphere of public law.

2) In pursuing these negotiations, it is fitting that the pontifical legate should ask, in the way and in the measure circumstances permit, for the opinion and the counsel of the episcopate and that he keep it informed on the development of negotiations.

A copy of the aforesaid pronouncement "On Papal Diplomats" is annexed hereto, made a part hereof by reference, and marked Exhibit E.

30. The Pro-Nuncio's statement of April 6, 1984, above-referred to, is also consistent with the provisions of Chapter V of the Code of Canon Law, that being Canons 362-367, which chapter deals with papal legates. A copy of these Canons are annexed hereto and made a part hereof by reference and marked Exhibit F.

81. In keeping with the responsibilities of a papal legate, as set forth in the Code of Canon Law, Archbishop Pio Laghi, in his April 6, 1984, address at The Catholic University of America, reasserted a statement which had been previously made by him in February of 1981 which is as follows:

> The papal representative cannot be a stranger to the people of the country to which he exercises his mission. At the same time, he must necessarily look beyond the best interests of any particular group. His criterion is the universality of the church. [See Exhibit D at page 8].

82. Plaintiffs further show that Archbishop Pio Laghi in his April 6, 1984, address as Pro-Nuncio in the United States, in referring to Pope John Paul's diplomatic concerns, stated:

> The Holy See believes that it finds itself in a unique position of spiritual and moral authority in the service of peace for all. Its diplomacy is deeply motivated by the spirit of the Gospel of Christ, and because it has no material interests to defend, it has been able to inspire the trust of an increasing number of nations. [See Exhibit D at p. 10]

It is therefore clear that the United States Government, through the action of the President of the United States, has entered into an understanding and agreement, not with a secular power, but rather with the Roman Catholic Church.

83. Subsequent to the exchange of ambassadorial level representatives between the United States of America and the Holy See, defendant Department of State and defendants Ronald W. Reagan, as President of the United States, Donald P. Regan, as former Secretary of the Treasury, and James A. Baker, III, as current Secretary of the Treasury, and William A. Wilson, as United States Ambassador to the Holy See, have engaged in actions which violate the First and Fifth Amendments to the United States Constitution, which actions are the direct result of the recognition of diplomatic relations between the United States Government and the Roman Catholic Church and the exchange of official representatives. Among such actions here complained of are the following:

(a) The United States Government has officially supported the papal position on liberation theology within the Roman Catholic Church in Latin America, which is an internal church matter; and

(b) Defendants have supported and promoted the interest and viewpoint of the Roman Catholic Church in Latin America, acting through its apostolic delegate in Mexico, seeking to cause the Roman Catholic Church in Latin America and governments located in Latin America to take action to "counteract the activity" and "nullify the influence" of Protestant groups, including some of the plaintiffs, in Mexico and other Latin America countries; and

(c) Defendants have cooperated with and assisted the papal authorities which are currently conducting a study of the

activities of religious sects, some of which are headquartered in the United States, for the alleged purpose of promoting "Christian unity." Some of the religious sects which are the subject of this current investigation include religious faiths of which some of the plaintiffs are members; and

(d) President Ronald W. Reagan, one of the defendants in this action, provided an Air Force jet to fly the papal pro nuncio, Archbishop Pio Laghi, from California to St. Thomas, Virgin Islands, to attend a Catholic Church meeting. The plane was provided at taxpayers' expense and with no cost to the Roman Catholic Church. The value of this benefit was at least in the amount of $16,310; and

(e) Defendants have permitted the Roman Catholic Church to send church correspondence from its Vatican headquarters through diplomatic channels to individuals located within the United States at no cost to the Roman Catholic Church and at taxpayers' expense. This service was allowed because of diplomatic privileges accorded to the representatives and staff of the Holy See located within the United States; and

(f) Defendant William A. Wilson, in his capacity as personal representative of the President to the Holy See and then subsequently as the United States Ambassador to the Holy See, has used his positions to assist Roman Catholic Archbishop Paul C. Marcinkus in matters that involve the Roman Catholic Church and has otherwise interceded into the administrative affairs of the Roman Catholic Church; and

(g) Defendant William A. Wilson, in his capacity as United States Ambassador to the Holy See, has ongoing dialogue and has offered the assistance of the United States Government to various Roman Catholic Church organizations, including the Congregation for the Doctrine of the Faith and the Congregation for Catholic Education, both of which have offices in the same building in which the United States Embassy to the Holy See is located.

84. Many of the religious organizations which are named as plaintiffs in this action maintain foreign missions in Latin

American countries which are controlled by governments elected with the direct and official support of the Roman Catholic Church and its prelates. The official opposition of the Roman Catholic Church, speaking through its nuncios and other prelates, to liberation theology, which is a religious view promoted by some within the Catholic Church in various Latin American countries, is popularly viewed as a direct intervention by the Roman Catholic Church in the secular affairs of the state. When the United States Government, acting through the United States Ambassador to the Holy See, supports and encourages the Roman Catholic Church as it involves itself in the affairs of Latin American Governments, there is a resulting negative impact on the work of the foreign missions operated by the religious organizations that are plaintiffs in this lawsuit. Any consequential anti-American, anti-religious and anti-democratic sentiments in the Latin American countries flowing from this anti-liberation theology position subjects the mission programs of plaintiff church organizations to an otherwise nonexistent burden.

85. Under Article II, section 2, clause 2, the President has the power to appoint ambassadors and other officers of the United States. Under Article II, section 3, the President has also been given the authority to receive ambassadors and other public ministers. Plaintiffs, however, claim that the President's authority is not unlimited in that the President of the United States has not, by Article II, been granted any authority to appoint ambassadors to a church.

86. Further, under Article II, section 2, clause 2, of the Constitution, the Senate is empowered to grant or withhold its advice and consent to the appointment of an ambassador. Under Article I, section 8, the Congress of the United States is empowered to tax and spend. However, the taxing and spending powers are subject to the limitation of the Religion Clauses of the First Amendment to the United States Constitution which prohibit any law respecting the establishment of religion. Plaintiffs claim that the Congress of the United States is without constitutional authority (a) to consent to the appointment of a diplomatic representative to a church organi-

zation; or (b) to consent to the use of tax funds for the aforesaid purpose. Plaintiffs further claim that by these congressional acts, taken together, Congress acted outside of its constitutional authority and in violation of the First Amendment. Any additional congressional appropriations to fund the diplomatic mission to the Holy See, that is the Roman Catholic Church, will directly violate the Establishment Clause of the First Amendment to the United States Constitution. Since annual appropriations will be required, there will be repeated congressional violations of the First Amendment unless this Court enjoins such further action by the Congress.

87. The action here complained of violates the Establishment Clause of the First Amendment to the United States Constitution because it prefers one religious denomination over all others, has the effect of advancing one religion and inhibiting all others, creates the potential for excessive church-state entanglement, provides the means whereby the federal government can openly or secretly participate in the affairs of a specific religious organization and provides the means for a specific religious organization to openly or secretly participate in the affairs of the federal government, requires the government to use the agency of a religious organization acting directly through members of its clergy and as a part of its "spiritual mission" to carry out the nation's governmental purposes, and provides the potential for divisive conflict based on religious interests. In this regard, plaintiffs show that the contact between the United States Government and the Roman Catholic Church, through the ambassador to the Holy See, requires that such contact, in large measure, will take place at the administrative and spiritual headquarters of the largest Christian denomination in the world. The atmosphere where the ambassador to the Holy See functions is pervasively sectarian. Those with whom the ambassador deals are, in large part, high ranking religious leaders, thus, creating the circumstances under which the likelihood that religion will be eventually entailed.

88. Under the Religion Clauses of the First Amendment to the United States Constitution and Supreme Court decisions

interpreting the same, the government must be certain that tax supported diplomatic representatives of the United States Government do not become entangled in religious affairs. Plaintiffs claim that in the context of the diplomatic relationship carried on within the religiously dedicated lands of a world church there, by necessity, is a fusion of governmental and religious functions. This is particularly true because "Papal Diplomacy rests essentially upon the spiritual sovereignty of the Holy See" and because the Holy See functions under its spiritual and moral authority. In such a situation any secular aspects of the diplomatic contact would be so inextricably intertwined with the spiritual mission of the Roman Catholic Church that it would be impossible to sever the secular from the spiritual.

89. As a result of the foregoing there would be the ever-present temptation for the government of the United States to tailor its foreign and domestic policy to satisfy the private urgings of one church or to influence, or seek to influence, the internal affairs of a church, or to use the instrumentality of a church to try to affect the policies of our nation.

90. In addition, the mere appearance of a continuing joint exercise of church and state involvement of the United States Government with a church headquarters provides a significant symbolic benefit to the Roman Catholic Church and a corresponding detriment to all other church organizations.

91. Plaintiffs further show that, unlike most instances where the government's activity has the effect of advancing one religion and inhibiting all others, here there is not even the opportunity to provide for a continuing governmental surveillance of the governmental involvement with religious affairs because so much of the diplomatic contact is under the veil of secret private meetings and exchanges memorialized in classified State Department documents. Thus, the only guarantee of protection from violations of the Religion Clauses of the First Amendment lies in the elimination of the potential for diplomatic assurances being negotiated in the halls of the Holy See with the clergy of the Roman Catholic Church.

92. Certain plaintiffs herein listed are members of the Roman Catholic Church or are organizations whose members belong to Roman Catholic Religious Orders or are lay members of the Catholic faith. Those plaintiffs specifically contend that the presence of a representative of the White House at the Vatican with direct access to the Holy Father is almost a direct invitation to civil interference in internal American church affairs. Plaintiffs contend that there have been historical examples of attempts by presidential advisors to cause the President to use his diplomatic representatives to solicit the support of the Holy Father for the appointment of an American church official to a church post. An attempt was made by President Theodore Roosevelt to cause the Pope to appoint a certain American archbishop to the position of cardinal in the Roman Catholic Church. In addition to the possibility of White House interference in domestic ecclesiastical affairs, there is also the danger that the government might seek to influence Catholic opinion on legislation through the machinery of the official diplomatic contact between the United States Government and the Holy See. As Vatican observer Reverend F. X. Murphy stated:

> The real fear, I think, among Catholics, you know, committed Catholics, is that the President may try to use the connection to put pressure on the bishops. For example, when they were working out the pastoral letter on peace, that the—Mr. Clark sent a letter to Archbishop Bernardin, and then the State Department sent General Vernon Walters to talk to the Pope about it. Well, we don't like that type of interference, and you, that has happened in history. . . .

See Exhibit G, a copy of an excerpt from the Sunday, January 15, 1984, CBS Television's edition of "Face the Nation." When spiritual and moral issues espoused by one church and political concerns merge, the potential for governmental intrusion into the internal affairs of a church is constantly present.

VI.

OTHER ALLEGATIONS

93. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

94. This proceeding is brought to, in part, enforce a provision of § 1983 of Title IX of Public Law 92-318 and therefore plaintiffs are entitled to recover their reasonable attorneys' fees as part of the cost of this action.

95. Each of the plaintiffs has standing to make the claims enunciated herein. The plaintiffs, in addition to the taxpayers' status of certain individual plaintiffs, each claim a particularized injury in fact, including:

(a) the denial of equal access to the Executive Branch of the United States Government. One major faith-group does and will have a special and unique ongoing relationship with the United States Government, not just as citizens of the United States petitioning their government, nor as religious leaders conversing with the President of the United States, but as diplomats, ministers plenipotentiary with formal, continuing access to the head of state of the United States. One denomination does and will have direct access to the President of the United States in a way that no other religious body has. Named plaintiffs include religious organizations and leaders of religious organizations that do not and will not have direct access to the head of state of the United States. Such organizations and their leaders are thus personally denied equal treatment;

(b) the spiritual and moral teachings and beliefs of one church which asserts certain of those beliefs in the political arena of the United States will have a continuing relationship with the United States Government even though other faiths in the United States, including plaintiff religious organizations and other religious organizations of which the individual plaintiffs are members, may have contrary or different spiritual and moral teachings on the same issues. Some of the named plaintiffs do, in fact, have spiritual and moral teachings that are in direct conflict with those espoused by the Roman Catholic Church, and the prelates of the Roman Catholic Church seek to obtain some governmental action in support of those teachings and beliefs;

(c) the actual or symbolic preference of the United States Government for one church enhances the ability of that church to compete in the religious marketplace, with a corresponding loss of public attention, acceptance, membership and church revenue to plaintiffs' churches. Here the effect of the government's actions is to confer the imprimatur of state approval on one particular church to the exclusion of all others including each of the religious organizations which are plaintiffs in this action;

(d) the government intrusion into the internal church affairs of the Roman Catholic Church by direct and day-to-day formal contact between the President and the Pope will result in the Catholic plaintiffs, who are members of named Catholic organizations, having reduced effective input into the affairs of their own church within the United States. The intrusion of the United States Government into the religious affairs of the Roman Catholic Church has restricted the ability of the two plaintiff organizations with Catholic membership from carrying on their spiritual activities;

(e) the exchange of diplomatic missions between the United States and the Holy See provides certain Catholic clergy, who minister to the Roman Catholic Church in the United States, with certain diplomatic benefits, privileges and immunities to which no clergy of any other religious body, including plaintiff religious organizations and their clergy, will ever be entitled. These benefits, privileges and immunities are required of all members of diplomatic missions by reason of Act Sept. 30, 1978, P.L. 95-393, 92 Stat. 808, that being 22 USC §§ 254a et seq. and by the provisions of the Vienna Convention on Diplomatic Relations which were signed on behalf of the United States on June 29, 1961. The Senate ratified the treaty on September 14, 1965, and on November 8, 1972, it was ratified by the President. A copy of the President's proclamation of the Vienna Convention on Diplomatic Relations is annexed hereto, made a part hereof by reference, and marked Exhibit H. Among the privileges and immunities to which members of a diplomatic mission, including those of the Holy See, are entitled, or have received, are:

1. exemption from all national, regional or municipal dues and taxes in respect of the premises of the mission other than such as represent payment for specific services rendered;

2. exemption from arrest or detention;

3. exemption from all civil process;

4. the free transmittal of correspondence relating to church and religious affairs at taxpayers' expense; and

5. the use of free transportation at taxpayers' expense;

(f) these plaintiffs and their congregants are subject to indirect pressures to conform to governmental policy which has resulted from diplomatic agreement between the United States and the Holy See even though such policy decisions may affect spiritual or moral issues;

(g) plaintiffs' beliefs and institutions are denigrated and demeaned by the government's actions. Not enjoying such official favor, they are seen as second-class citizens, subscribing to religions of lesser worth.

(h) the fusion of United States' political interests with the religious position of the papal leadership of the Roman Catholic Church brought about by the diplomatic relationship established by the United States and the Holy See concerning the issue of liberation theology in Latin America directly jeopardizes the foreign mission work operated under the auspices of religious organizations which are plaintiffs in this action. Not only are the property and programs of such missions threatened, but the life of the missionaries themselves are endangered by such activities.

96. Plaintiffs' injuries are "fairly traceable" to defendants actions here complained of. There is also a "substantial likelihood" that the court can grant relief which will effectively redress plaintiffs' injuries. A declaration of illegality and/or an injunction as herein requested will end this governmental action which favors one religion over all others.

VII.

CAUSES OF ACTION

A. First Cause Of Action

97. The action of the Congress in consenting to the appointment of an ambassador to the Holy See, and the authorization and appropriation of funds of the diplomatic mission to the Holy See is in violation of the First Amendment to the United States Constitution for the reasons hereinbefore set forth and because it creates a formal official relationship between the United States Government and a church, prefers one religious denomination over all others, creates a special benefit for one religious organization and a corresponding detriment for all other religious organizations, provides the potential for excessive governmental entanglement between church and state and for federal government intrusion into the affairs of the Roman Catholic Church and the said church into the affairs of the United States Government on a continuing basis, and results in political and religious divisiveness.

B. Second Cause Of Action

98. The action of the President in recognizing the Holy See as a sovereign entity, appointing an ambassador to it, and receiving a papal Pro-Nuncio in return is in excess of the powers conferred upon the President by Article II of the United States Constitution in that the Holy See to which the ambassador has been sent and from which the papal legate has been received is not a sovereign state but rather is a church, a private rather than public entity. The Constitution of the United States, being a document of grants of power to the federal government, rather than a reservation of power, has not granted any authority to the President of the United States or to the Congress to establish official ties and relationships between the federal government and any private church organization. Therefore, any official governmental act attempting to establish such an official relationship is void and of no effect. Further, the Religion Clauses of the First Amendment and the

Liberty Clause of the Fifth Amendment provide for a specific limitation on both the executive and legislative branches of government preventing the creation of any permanent church-state linkage such as is inherent in a diplomatic relationship.

C. Third Cause Of Action

99. The establishment of diplomatic relations, the exchange of diplomatic missions by the United States Government and the Holy See, and the congressional funding of the new embassy to the Holy See all constitute a special preference for one religious group over all others in violation of the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

D. Fourth Cause Of Action

100. The defendant Department of State and defendants Ronald W. Reagan as President of the United States, George P. Shultz as Secretary of State and William A. Wilson as United States Ambassador to the Holy See have exercised their authority resulting from the recognition by the United States Government of the Holy See and the exchange of ambassadorial level representatives between the United States of America and the Roman Catholic Church in violation of the First and Fifth Amendments to the United States Constitution by:

(a) providing support for the Roman Catholic Church to the detriment of all other churches and religious organizations, including the plaintiffs;

(b) by expending tax funds and providing tax supported facilities for the use and benefit of the Roman Catholic Church and its prelates within the United States;

(c) causing officials of the United States Government, including defendant William A. Wilson, to join with representatives of the Roman Catholic Church to support efforts of the Roman Catholic Church to "counteract the activity" and "nul-

lify the influence" of Protestant groups, including some of the plaintiffs, in their foreign mission activities; and

(d) cooperating with and assisting the efforts of the Roman Catholic Church in the investigation of various United States religious organizations, including some of which plaintiffs are members, so as to determine what actions may be taken to reduce the influence of those religious organizations which the Roman Catholic Church believes to be a threat to "Christian unity." The aforesaid actions herein complained of represent constitutional violations resulting from the exercise of authority, as said defendants have administered and applied that authority, as a result of the declaration of diplomatic recognition of the Holy See, the exchange of ambassadorial level officials and the continuing diplomatic contact between church and state.

VIII.

PRAYERS FOR RELIEF

WHEREFORE, plaintiffs pray the following relief be granted:

1. For a declaration that congressional actions consenting to the appointment of an ambassador to the Holy See and the funding, past and future, of the diplomatic mission to the Holy See are violative of the First Amendment to the United States Constitution and are therefore null and void in that respect.

2. For a declaration that the President's diplomatic recognition of the Holy See, the appointment of an ambassador to the Holy See, and the receiving of the papal legate from the Holy See be determined to be beyond the powers of the President under Article II of the United States Constitution and not authorized by the Constitution and in fact specifically prohibited by the First and Fifth Amendments to the United States Constitution and therefore null and void.

3. For a declaration that the diplomatic recognition of the Holy See and the exchange of ambassadorial level officials

constitute a preference of one religion over another in violation of the Liberty Clause of the Fifth Amendment to the United States Constitution.

4. That the defendants be enjoined, first by preliminary and later by permanent injunction, against any further funding of a diplomatic mission to the Holy See.

5. That defendant William A. Wilson be enjoined, first by preliminary and later by permanent injunction, from engaging in any further activity in the capacity of an ambassador from the United States of America to the Holy See.

6. That defendants be enjoined, first by preliminary and later by permanent injunction, from providing moneys, services or facilities of the United States Government to directly assist the Roman Catholic Church or any of its prelates in the carrying out of its religious activities as a result of the Roman Catholic Church conferring upon any of its prelates the title of pro nuncio or any other claimed diplomatic status.

7. That defendant George P. Schultz as Secretary of State and defendant William A. Wilson as United States Ambassador to the Holy See, the defendant Department of State, its agents and employees, be enjoined, first by preliminary and later by permanent injunction, from any further activity providing support or assistance to the Roman Catholic Church which in any manner aids the Roman Catholic Church in any action directed against any other religious organization or in any religious action of the Roman Catholic Church involving internal disputes within that church.

8. For costs of suit herein incurred.

9. For reasonable attorney fees; and

10. For such other and further relief as the court may deem just and proper.

Dated: March 13, 1985

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ADDRESS OF ARCHBISHOP PIO LAGHI
APOSTOLIC PRO-NUNCIO IN THE UNITED STATES
THE CATHOLIC UNIVERSITY OF AMERICA
WASHINGTON, D.C.
April 6, 1984

Archibishop Hickey, Chancellor of this great University; Father Byron, the President; Distinguished Members of the Administration and Faculty; and dear Students:

Towards the end of last year, I received a letter from Father Byron in which he mentioned that the Catholic University had been trying, unsuccessfully, to confer upon me an honorary degree ever since I came to the United States as the Pope's personal representative. In response to Father Byron, I noted that I was very pleased to accept this honor and that I would consider it a great distinction to be regarded as an honorary alumnus of this fine institution. Your dynamic President also suggested to me that this would provide me with an excellent opportunity to deliver an address on the topic of my choice. When left with that sort of an unlimited option, the choice of a suitable subject for an address sometimes becomes even more difficult. However, I hope you will not accuse me of an excessive narcissism if I have chosen to focus on a topic which for thirty-two years now has been my special calling: Papal Diplomacy. It is my perception that the recent decision of the United States and the Holy See to resume full diplomatic relations after a hiatus dating back to 1868 has sharpened interest in this sector of the Church's role in the contemporary world. Thus, I propose to speak to you about three specific points:

1) Papal Diplomacy in general;
2) The Role of the Papal Representative;
3) and, Pope John Paul II's Diplomatic Concerns.

I. PAPAL DIPLOMACY IN GENERAL

When it comes to giving a definition of Papal Diplomacy, the old scholastic adage, *tot sententiae quot capita*, is right on the

mark. I think, however, that the definition given by the late Archbishop Cardinale, who died last year while serving as Papal Representative to Belgium, helps us to understand what Papal Diplomacy is all about. He defines it in these terms:

> "The system which, in accord with the rules of both ecclesiastical and international law, governs the relations between Church and State with a view to ensuring their harmony and cooperation and thus promoting lasting good will, understanding and peace among all peoples." (H.E. Cardinale, *The Holy See and the International Order*, p. 37)

Papal Diplomacy has been referred to as *sui generis*, because nowhere is it exactly paralleled. In fact, the Catholic Church is the only religious body that I know of that engages in direct relations with various states. You recall the confusion and controversy that arose in the media at the time it was announced that the United States and the Holy See intended to re-establish diplomatic ties. Some mistakenly tried to justify the American government's action by implying that it was entering into a diplomatic relationship not with the Roman Catholic Church as such, the Holy See, but rather with the sovereign Vatican City-State.

> "Papal Diplomacy rests essentially upon the spiritual sovereignty of the Holy See and not upon dominion over a few acres in the heart of Rome." (R.A. Graham, S.J., *Vatican Diplomacy*, p. 15)

It is, therefore, the Pope's religious authority which confers upon him the classical right of legation, a diplomatic standing in the world. Those who interpret Papal Diplomacy as emanating from the Pope's temporal sovereignty are failing to understand the true nature of the mission of the Holy See.

One of the most notable practitioners of Papal Diplomacy in our times was the late Pope Paul VI. In 1951, when he was Monsignor Montini, the Pro-Secretary of State of Pope Pius XII, the future Pontiff delivered a major address at the Pontifical Ecclesiastical Academy on the occasion of that institution's two hundred and fiftieth anniversary. I was in my final

year of preparation for service in the Vatican Diplomatic Corps at that time, and I still remember with fondness the remarkable message Monsignor Montini left with all of us that memorable day. He titled his talk, "Papal Diplomacy As a Means of Representing Christ Before The World." Monsignor Montini re-affirmed for us budding diplomats that

> "Diplomacy is neither alien nor contrary to the ecclesiastical spirit, nor, least of all, to the authority of the Church and of the Sovereign Pontiff. If diplomacy works through the medium of responsible representatives, if it seeks to construct peace, if it is indeed the art of peace, then no other institution and no other relationship between the peoples more deserves the support of the Catholic Church which, more than any other earthly good, seeks, preaches and gives birth to this peace, true peace."

The man who would become Pope Paul VI was not so greatly concerned with defending or justifying the existence of diplomacy in the Church as he was intent on reminding us that, if there must be diplomacy in the Roman church, it must be *good* diplomacy. He told us that the diplomacy of the Holy See has its distinctive character: it sends its representatives to various countries not only to defend the rights of the Holy See and of the Church, but equally to defend the rights and to serve the needs of the people to whom they are sent.

> "The ecclesiastical diplomat does not make use of intrigue and guile in his relations with the government which has received him as a diplomatic interlocutor. The ecclesiastical diplomat brings words of understanding; he supports the just demands of the population; he collaborates with the government and nation who have offered him hospitality . . . That is why the Church considers diplomacy as a service of love towards the peoples, and the school which prepares men for it is a school of charity."

Monsignor Montini concluded his discourse with a warning:

> "You must all know what it means to be representatives. Diplomacy means representation. Let us know what it means to represent Christ, and to represent the Church."

Nearly two decades later, Pope Paul received in solemn audience the Members of the Diplomatic Corps accredited to the Holy See for the presentaton of their New Year greetings to him. Once again, the Pontiff who spent the greatest part of his priestly life in diplomatic service raised an old, familiar question: For the Church, whose essential role is a religious one, is recourse to diplomacy truly justified? I would like to quote at some length the answer given by Pope Paul, for I maintain that it allows for a clear and precise understanding of the objectives of Papal Diplomacy in today's world:

> "The diplomatic activity of the Holy See responds to the present developments of international life and to the present needs of the mission which the Church must fulfill in the contemporary world. The Second Vatican Council has spoken of this mission by solemnly affirming that the Church is called upon to give a determinative aid to society, by fortifying and solidifying the unity of the human family . . . (The Holy See wishes to) help to render closer the bonds between nations, by mutual dialogue, careful to recognize the rights and duties of each. The Roman Pontiffs, particularly in the modern and contemporary period, became more and more keenly aware of this responsibility which flows directly from their mission. And they replied to this imperative inherent in their office: that of becoming interested also in civil society, not to interfere unduly in a domain outside their scope, but to foster respect for the basic principles of civil and international life, justice towards all, mutual concord, collaboration among peoples; briefly, to cooperate in the peaceful search for this common good, of which the temporal authority should be the guarantee in order to serve and to defend peace." (Address to the Diplomatic Corps, January 12, 1970)

As long as the Church continues to engage in diplomatic activity with States and international organizations, it will not escape the criticism and objections of those who feel it is an inappropriate and anachronistic method for a Church to employ. In its broadest outlines and essential function, Papal Diplomacy is in agreement with the general aims of diplomacy which tends ultimately to secure the reconciliation and unifica-

tion of the world through the peaceful and prosperous growth of individual States. As Archbishop Cardinale points out in his classic work on Papal Diplomacy:

> "The Holy See is the only Organization which can authoritatively entrust its diplomatic agents with a mission which, being at once religious, political and social, is entirely dedicated to peacemaking at the principal levels of human activity." (op. cit., p. 39)

* * *

THE ROLE OF THE PAPAL REPRESENTATIVE

Just last month, I was asked to give an interview to two representatives from the print media. In the course of the interview, one of the reporters sought a definition of the role of the Papal Representative. Responding to the question, I told him that I conceived that role in terms of one who conveys the position of the Holy See on an issue or situation when a government asks to know that position. On another occasion, I have described the role of a Representative as being like that of a filter which studies and evaluates information as it flows between the Holy See and the United States.

In order to have a better appreciation of the role of a Papal Representative, I ask you to consider the term which the Holy See uses to designate the person holding such an office. We are not usually referred to as Ambassadors, though in point of fact that is the function we perform. Unlike the representatives from other nations in the world, the Holy See prefers to use the term, *Nuncio*, which derives from the Latin *nuntius*. We exercise the role of messengers, heralds of the Good News and for this reason the Holy See has retained this title for its representatives.

Pope Paul VI gave what is, perhaps, the most accurate description of the role of the modern Papal Representative. In 1970, when he visited Southeast Asia, he addressed the Papal Representatives from that region who had come to Manilla. In his talk, Paul VI declared:

> "The role of Nuncios is also evolving. Until now, the Nuncio was little more than the Pope's representative to Governments and Churches. His activity with regard to the Churches was above all of a hierarchical and administrative nature; in a certain sense he remained a stranger to the local Church. Today, the Nuncio must place a more pronounced pastoral accent on his work. He too is at the service of the Kingdom of God as it goes forward in the land . . . You, the Representatives of the Pope, must be for the local hierarchies a living sign of collegiality, sharing as far as you can their pastoral preoccupations. Coming from the heart of Christianity, you are the witnesses of the catholicity, that is, the universality of the Christian message. Sharing as you do in the special charism of Peter, you represent in a privileged way the demands of unity in the desired diversity of expressions of the same faith. By reason of the apostolic college, you constitute to some extent a link between the individual Churches of the entire world." (Address of Pope Paul VI, Manila, 1970)

It is clear from these words that Pope Paul VI viewed the role of the Papal Representative more in terms of his mission to the local Church than to the government to which he was accredited. As a matter of fact, I can tell you that the reality shapes up precisely that way. I spend most of my time dealing with issues that are distinctly religious in nature, and only a small portion of my day is taken up by matters that pertain to my diplomatic position with the United States Government.

When I arrived in Washington and was received at the National Shrine as Apostolic Delegate, on February first, 1981, I stressed this point in the following words:

> "The Papal Representative cannot be a stranger to the people of the country to which he exercises his mission. At the same time, he must necessarily look beyond the best interests of any particular group. His criterion is the universality of the Church. Along with the Pope, whose envoy he is, the pontifical representative belongs to no faction or social group. He belongs to all the people, for the teaching of the Holy Father reaches out to all his family and is universal in scope." (Archbishop Pio Laghi, Homily at the National Shrine, February 1, 1981)

III. POPE JOHN PAUL'S DIPLOMATIC CONCERNS

For Pope John Paul, what characterizes the diplomacy and international activity of the Holy See is its *humanitarian concern*. This term embraces the shunning of everything that is injurious to the life, to the dignity, of individuals and communities. In his January, 1983 address to the Members of the Diplomatic Corps accredited to the Holy See, the Holy Father affirmed:

> "The Church feels particularly called on to make itself, as much as possible, the Good Samaritan of those who are left abandoned along the path of history." (Address to the Diplomatic Corps, January 15, 1983)

It is Pope John Paul's conviction that the Church should make itself the voice of those without a voice, the poor, the victims of every kind. The Holy See, which in the name of the Church has the opportunity of entering into relationships with the leaders of countries, hopes that its intervention will at least be accepted; that it will afford a change for relief for the victims of oppression of every sort. The Holy See requires nothing, demands nothing for itself; it lends its voice and offers a humanitarian gesture.

> "The universal vocations of the Church must be to the eyes of everyone a proof of its disinterestedness and impartiality. It is man, as man, that concerns it, and all the more so in that it sees in him the image of the Creator, the brother of Christ." (January 15, 1983)

The Holy Father maintains that, in order to serve the common good, to serve the cause of the poor and the oppressed, the Holy See is convinced that it must act in all independence. This independence permits the Holy See to listen to all human, religious and political expressions, to open its door to all who have some responsibility, some influence. John Paul describes well how he understands his diplomatic role:

> "The role of a priest, of a bishop, the duty of a Pope is to receive the persons, if this can be of service to a progress in

> justice and in peace; and precisely to encourage them, with all clarity, in this direction, to exhort them, without any compromise whatever, to renounce the means of violence and terrorism in support of the cause of the poor which they claim to be defending. The Holy See is not exclusive, and it is ready to deal with everyone, if it judges it salutary and prudent to do so." (January 15, 1983)

The Holy See believes that it finds itself in a unique position of spiritual and moral authority in the service of peace for all. Its diplomacy is deeply motivated by the spirit of the Gospel of Christ, and because it has no material interests to defend, it has been able to inspire the trust of an increasing number of nations. Within the framework of international diplomatic circles, the Holy See desire first of all to promote trust.

Let me conclude my remarks here today with a quotation from Pope John Paul:

> "The Church wishes to be welcoming, like Christ. She knows that the power of evil is great; that hardening can endure; she is without illusions. But she can never despair of a change in people even when they continue to offend, even to persecute her. She sends out an appeal to dialogue. She strives to arouse the sense of truth, of justice, of fraternity, at least of prudence, which may lie dormant in the human conscience, which is never totally perverted, despite certain contrary ideologies. She has in view the welfare of people who are suffering, in great numbers, behind these situations of distress. She wishes to entreat the world to offer these relief. In her opinion, the major obstacles erected by certain persons in positions of responsibility will inevitably collapse in the long run, for the generations renew themselves. Nevertheless, she will not yield to the present trials. In short, her attitude is built on confidence in the progress of persons and on the future. Who can reproach her for this? (January 15, 1983)

I want all of you to know that I am deeply honored by the distinction you confer upon me today. After what I have stated in regard to my life as a diplomat in the service of the Holy See, I think that you can well understand how I might interpret your gracious gesture towards me as one of recognition not of my personal accomplishments, but of the achievements of the Holy

See and of the Vicar of Christ himself. For this reason, I am particularly grateful to all of you who have played any part in making possible the conferral of this honorary degree.

I have always been keenly interested in this fine institution and its educational mission, and now I have added reason to be justifiably proud of all that the Catholic University of America represents for the Church and Society in this great nation.

Supreme Court, U.S.
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No. 86-113

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN BAPTIST CHURCHES IN THE U.S.A., ET AL.,
PETITIONERS

v.

RONALD W. REAGAN, PRESIDENT OF THE
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioners were without standing to challenge the President's decisions to establish diplomatic relations with and to appoint an ambassador to the Holy See.

2. Whether the court of appeals erred in its alternative holding that in any event petitioners' challenge to the President's decisions presents a nonjusticiable political question.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 786 F.2d 195. The opinion of the district court (Pet. App. 21a-29a) is reported at 607 F. Supp. 747.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-19a) was entered on March 21, 1986. A petition for rehearing and suggestion for rehearing en banc was denied on April 25, 1986 (Pet. App. 20a). The

petition for a writ of certiorari was filed on July 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The State of Vatican City is an area of 109 acres within the City of Rome. The Pope of the Roman Catholic Church is the spiritual sovereign of this city-state. See 22 Encyclopaedia Britannica 905 (1971). The Holy See, a component of the Roman Catholic Church heirarchy, is the territorial sovereign or government of that state. See J. Crawford, *The Creation of States in International Law* 156-159 (1979). In that sovereign capacity, the Holy See "occupies a recognized position in international law" (*Ponce* v. *Roman Catholic Church*, 210 U.S. 296, 318 (1908)) and, accordingly, conducts diplomatic relations with more than 80 foreign countries and sends representatives to various international organizations, including the United Nations. See II *The Europa Year Book* 2953 (1986); *Restatement of Foreign Relations Law of the United States* § 201, reporter's notes ¶ 7 (Tent. Draft No. 2, 1981).

The United States first established consular relations with the Holy See in 1797. In 1848, it formalized the two governments' relationship and, from 1848 to 1867, sent four official emissaries, all confirmed by the Senate, to serve there. See *Nomination of William A. Wilson to be Ambassador to the Holy See: Hearing before the Senate Foreign Relations Comm.*, 98th Cong., 2d Sess. 16 (1984). Formal diplomatic relations between the United States and the Holy See were severed in 1867 (see Pet. App. 6a, 23a), and the two governments did not exchange any further representatives until 1939, when President

Roosevelt and Pope Pius XII informally reestablished relations. See R. Graham, *Vatican Diplomacy* 326 (1959). Over the next forty years, various Presidents appointed personal envoys to the Holy See. Recent Developments, 25 Harv. Int'l L. J. 441, 443-444 (1984). In 1984, after Congress cleared the path by way of legislation (Act of Nov. 22, 1983, Pub. L. No. 98-164, § 134, 97 Stat. 1029), President Reagan exchanged formal diplomatic notes with the Holy See and nominated William A. Wilson to be the United States' Ambassador to that government. See 130 Cong. Rec. S2390 (daily ed. Mar. 7, 1984) (confirming Mr. Wilson's appointment).

2. Petitioners are the umbrella organizations for various religious groups. See Pet. 4. In November 1984, they filed this action in the United States District Court for the Eastern District of Pennsylvania, challenging the President's decision to reestablish diplomatic relations with the Holy See. Petitioners claimed that the President's actions violated their rights under the First and Fifth Amendments of the Constitution. See Pet. App. 66a-68a. The district court dismissed their complaint (*id.* at 30a). It found that petitioners had "tried valiantly to identify particularized injury-in-fact * * *, but [that] the effort ha[d] failed" (*id.* at 25a). The court accordingly held that petitioners "lack[ed] standing to pursue" their challenge to the President's decisions (*id.* at 26a). Alternatively, the court held that, even if petitioners had standing to sue, the political question doctrine would bar it from reviewing the President's decision to accord diplomatic recognition to a particular foreign state (*id.* at 26a-28).

The court of appeals unanimously affirmed the dismissal of petitioners' complaint (Pet. App. 1a-16a).

On the standing issue, the court rejected petitioners' attempt to establish their standing as "taxpayers," as "citizens," or as "religious adherents" (*id.* at 9a-14a). The court held that petitioners lacked standing to sue as "taxpayers" because they did not challenge an expenditure under the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1) and thus did not fall within the narrow exception to the general rule against "taxpayer standing" that this Court has recognized. Pet. App. 9a-11a (discussing *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)). The court further held that petitioners lacked standing to sue as "citizens" attempting to vindicate Establishment Clause values, noting that this Court "has consistently rejected claims of citizen standing predicated upon the right, possessed by every citizen, to require that the government be administered in accordance with the Constitution" (Pet. App. 12a, citing *Allen* v. *Wright*, 468 U.S. 737 (1984)). And, finally, the court held that petitioners lacked standing to sue as "religious adherents," since petitioners had not alleged with sufficient specificity how, if at all, they were "direct[ly] and palpabl[y]" disadvantaged by the Holy See's official diplomatic status or, in any event, how any disadvantages petitioners suffered were attributable to the President's actions, as opposed to the Vatican's unique status as a territorial sovereignty controlled by the heirarchy of a particular church (Pet. App. 8a, 12a-14a).

Alternatively, assuming *arguendo* that petitioners had standing to sue, the court of appeals held that they could not overcome "the hurdle of justiciability"

(Pet. App. 14a). The court pointed out that petitioners' complaint "c[ould] only be read as a request for judicial review of the President's decision to extend diplomatic relations to the Vatican" (*ibid.*). In that light, the court noted the well-settled principle that the establishment of diplomatic relations is a matter that "the Constitution commits exclusively to the Executive Branch" and, accordingly, held that the President's action in recognizing the State of Vatican City was "a judicially unreviewable political decision" (*id.* at 15a).

ARGUMENT

The decision below is correct. Petitioners do not allege (nor is there) a conflict among the circuits on the question presented. There is no basis for further review.

1. Petitioners first challenge the court of appeals' holding that they were without standing to contest the President's decision to reestablish diplomatic relations with the Holy See (Pet. 5-16). Petitioners seem to accept the court's premise that, to establish their standing, they had to allege an "injury in fact" that had a "causal connection between them and the challenged governmental action" (Pet. App. 12a). But petitioners take issue with the court's conclusion that the injuries they alleged either were too "generalized" to satisfy the injury-in-fact requirement (*id.* at 13a) or were not causally connected to the President's decision to recognize the State of Vatican City (*id.* at 13a-14a). Petitioners' arguments are meritless.

Petitioners' allegation that the reestablishment of diplomatic relations with the Holy See denies them equal "access" to the United States Government (see

Pet. 10) simply does not state a judicially cognizable "injury in fact." The Constitution does not give petitioners any right of "access" to the Government. "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271, 285 (1984). Unless the government creates a "public forum" for discussing particular subjects (*Madison Joint School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976)), members of the public have no right to complain that government officials have opted to "meet and confer" with other individuals or groups. See *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, 464-466 (1979); cf. *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip op. 10. And, even if the denial of "access" could create a judicially cognizable injury, petitioners still would not have standing. They have not alleged that they have ever sought and been denied such "access" in circumstances where the ambassador from the Holy See was granted access because of his official diplomatic status. Cf. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-167 (1972). Thus, petitioners have not alleged that they have been "personally denied equal treatment solely because of their membership in a disfavored group" (*Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984)).

Petitioners' allegation (Pet. 10-11) that the effect of the President's reestablishment of diplomatic relations with the Holy See "is to confer the imprimatur of state approval on one particular church to the

exclusion of all others" is equally incompetent to establish a judicially cognizable injury. This Court has flatly rejected the idea that "abstract stigmatic injur[ies]" can provide the injury in fact that is a condition precedent to standing. See *Allen* v. *Wright*, 468 U.S. 737, 755-756 (1984) (denying standing to parents of black school children who claimed that they suffered stigmatic injury because of federal tax exemptions granted to allegedly discriminatory private schools); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-487 (1982) (denying standing to organization dedicated to separation of church and state which claimed that it suffered stigmatic injury from the government's conveyance of property to a church-related college). To be sure, the Court has indicated that, where individuals " 'are personally denied equal treatment' by the challenged discriminatory conduct," an allegation of stigmatic injury may suffice (*Allen* v. *Wright*, 468 U.S. at 755, quoting *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984)). But petitioners have not alleged that they have been personally denied any benefit or privilege, or that they they have personally suffered any disadvantage, in consequence of the President's decision to accord diplomatic recognition to the Vatican. Petitioners' claims of "stigmatic injury" are thus of the generalized and abstract sort that do not satisfy the "injury in fact" requirement of standing doctrine. See *Allen* v. *Wright*, 468 U.S. at 755, 757 n. 22.[1]

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[1] Petitioners attempt to characterize the court of appeals' decision as holding that stigma arising from unequal treatment under the Establishment Clause can never satisfy the injury-in-fact requirement. See Pet. 8-9, 12. Petitioners mis-

As an alternative ground on which to predicate their standing, petitioners alleged in their complaint that the President's establishment of diplomatic relations with the Holy See expressed " 'the actual or symbolic preference * * * for one church,' " a preference that assertably " 'enhances the ability of [the Roman Catholic Church] to compete in the religious marketplace, with a corresponding loss of public attention, acceptance, membership and * * * revenue to [petitioners'] churches' " (Pet. 10, quoting Pet. App. 64a). But this allegation is likewise incompetent to establish injury in fact. Petitioners have not alleged that any of their religious organizations "has sustained or is immediately in danger of sustaining" any of these adverse consequences. *Ex parte Levitt*, 302 U.S. 633, 634 (1937). See also *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Petitioners' allegations, rather, "take[] us into the area of speculation and conjecture" (*O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974)), and "[s]uch speculation is insufficient to establish the existence of a present, live controversy" (*Ashcroft* v. *Mattis*, 431 U.S. 171, 173 n.2 (1977)). And even if petitioners had specifically alleged an actual loss of revenue or membership, such alleged consequences could not "fairly * * * be traced to the challenged action of the de-

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read the court of appeals' decision. That court recognized that such claims may sometimes confer standing, but correctly held that standing is available "only to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct' " (Pet. App. 14a, quoting *Allen* v. *Wright*, 468 U.S. at 755). Accord, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. at 486. Since petitioners do not make any concrete allegations that they personally have been treated unequally, they do not allege a sufficient injury in fact.

fendant." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Such declines in membership or revenue could be attributable to myriad social, cultural, economic, and demographic factors (see *Allen* v. *Wright*, 468 U.S. at 758-759), and any connection between petitioners' alleged harms and the President's actions would be "attenuated at best" (*id.* at 757). Thus, the disadvantages that petitioners allegedly suffer simply do not satisfy the requirements of this Court's standing decisions.

In any event, as the court of appeals recognized (Pet. App. 13a-14a), the unequal treatment about which petitioners complain is not "likely to be redressed by the requested relief" (*Allen* v. *Wright*, 468 U.S. at 751). Petitioners' grievance at bottom stems from the fact that the State of Vatican City, unlike most other governments, is a territorial sovereignty controlled by the authorities of a single religion. As the court of appeals pointed out, "the Roman Catholic Church's unique position of control of a sovereign territory [may] give[] it certain advantages that other religious organizations do not enjoy" (Pet. App. 8a). Officials of the Holy See and the United States Government conferred frequently between 1939 and 1984, when various Presidents sent personal envoys to the Vatican. See pages 2-3, *supra*. And officials of the Holy See and the United States Government would undoubtedly have continued to confer regardless of whether or not the President decided to exchange diplomatic notes with the Vatican. To guarantee petitioners the "equal access" to Executive Branch officials that they demand, the federal courts would have to become "continuing monitors of * * * Executive action." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). The separation-of-powers

concerns that underlie the standing doctrine bar them from doing so. Accord, *Allen* v. *Wright*, 468 U.S. at 761; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974).[2]

2. Petitioners next contend (Pet. 17-21) that the court of appeals erred in its alternative holding that their challenge to the President's decisions presents a nonjusticiable political question. Their contention is without merit. Even if petitioners were thought to have standing to sue, the political question doctrine would require dismissal of their complaint.

The Constitution vests all authority concerning the recognition of foreign states and their governments,

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[2] Petitioners err (Pet. 13) in citing *Baker* v. *Carr*, 369 U.S. 186 (1962), to buttress their standing argument. There, plaintiffs alleged " 'a plain, direct * * * interest in maintaining the effectiveness of their votes' " (369 U.S. at 208, quoting *Coleman* v. *Miller*, 307 U.S. 433, 438 (1939)), an interest that this Court has long recognized as supporting "a legally cognizable injury." *Baker* v. *Carr*, 369 U.S. at 208. Here, by contrast, petitioners have failed to allege "any personal injury suffered by them as a consequence of the alleged constitutional error." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. at 485 (emphasis deleted).

Although petitioners do not contend that there exists a conflict among the circuits on the standing question presented here, they do assert (Pet. 6) that this Court's standing decisions have bred "confusion" in the lower courts. This assertion, which petitioners do not support with citation of any lower-court opinions, is insubstantial, as a review of recent decisions shows. See, *e.g.*, *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268-269 (7th Cir. 1986); *Hawley* v. *City of Cleveland*, 773 F.2d 736, 739-740 (6th Cir. 1985), cert. denied, No. 85-1168 (Mar. 3, 1986); *Bell* v. *Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103-1108 (11th Cir. 1983).

and the nature of diplomatic relations to be conducted with those governments, in the President. U.S. Const. Art. II, § 2, Cl. 2, § 3; see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410-411 (1964); *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942); *United States* v. *Belmont*, 301 U.S. 324, 329-330 (1937); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). The President's "action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts" (*Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 138 (1938)). This Court's "cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes" (*Goldwater* v. *Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting)). Since petitioners' "complaint can only be read as a request for judicial review of the President's decision to extend diplomatic relations to the Vatican" (Pet. App. 14a), the court of appeals correctly held that their challenge involves a matter "that the Constitution commits exclusively to the Executive Branch" (*id.* at 15a).

Petitioners seem to agree (Pet. 10) that the State of Vatican City is a "territorial sovereignty" and that foreign states can and do conduct diplomatic relations with it. Petitioners assert, however, that the United States succeeded in establishing diplomatic relations only "with the Catholic Church, to wit: the Holy See and not the territorial sovereignty of the State of Vatican City" (*ibid.*). Petitioners contend that their characterization of the Holy See as a purely religious body, rather than as a governmental authority, is "the basic allegation on which [their] entire case is premised," and they say that "this

allegation must be accepted as true" for purposes of ruling on the motion to dismiss (*ibid.*).

Petitioners' contention misses the point by a wide margin. The point of the political question doctrine, as it applies to this case, is that courts may not second-guess the President's decision *either* that a particular foreign nation is entitled to diplomatic recognition *or* that a particular entity or government is the proper representative of that nation for diplomatic purposes. "What government is to be regarded here as representative of a foreign sovereign state," this Court has held, "is a political rather than a judicial question." *Guaranty Trust Co.* v. *United States*, 304 U.S. at 137. Accord, *United States* v. *Pink*, 315 U.S. at 229. The question of "who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts." *United States* v. *Belmont*, 301 U.S. at 328. Accord, *United States* v. *Pink*, 315 U.S. at 229. The political question doctrine thus would prohibit a district court from reviewing the President's decision that the Holy See is the "government" of the territorial sovereignty of the State of Vatican City. Petitioners plainly cannot finesse that prohibition by seeking to characterize their views of the Holy See as a factual allegation which "must be accepted as true" (Pet. 10). Since the political question doctrine would preclude the district court from *investigating* the truth of petitioners' allegation, that allegation cannot and need not be "accepted as true" for purposes of ruling on the motion to dismiss.[3]

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[3] Petitioners' assertion (Pet. 18) that the Holy See considers the United States to have established diplomatic relations

3. The only other court that has addressed a challenge to the President's decision to establish diplomatic relations with, and appoint an ambassador to, the Holy See also dismissed the plaintiffs' complaint on the basis of standing and the political question doctrine. *Phelps* v. *Reagan*, No. 84-4015 (D. Kan. July 22, 1985), appeal pending, No. 85-2279 (10th Cir.). Absent a conflict in the circuits on this question, which petitioners concede is "undeniably unique" (Pet. 5), review is plainly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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with the Roman Catholic Church is irrelevant. The relevant question does not relate to the Holy See's views, but to the President's views concerning the diplomatic relations that he has established. See *United States* v. *Pink*, 315 U.S. at 229-230; *United States* v. *Belmont*, 301 U.S. at 328. In reestablishing diplomatic relations with the Holy See, the President clearly viewed the Holy See as a government, and not as an exclusively religious authority, and that determination "conclusively binds the courts" (*ibid.*). See L. Henkin, *International Law Cases and Materials* 207-208 (1980).

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No. 86-113

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

AMERICAN BAPTIST CHURCHES
IN THE U.S.A., et al.,
Petitioners,

vs.

RONALD W. REAGAN, et al.,
Respondents.

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the court below err in holding that Petitioners, most of whom are Protestant and Jewish religious organizations and their clergy, lack standing to challenge the appointment of an ambassador to the Holy See?

2. Did the court below err in holding that Petitioners' case must be dismissed because it seeks to address a non-justiciable political issue?

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No. 86-113

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

AMERICAN BAPTIST CHURCHES
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Petitioners,

vs.

RONALD W. REAGAN, et al.,
Respondents.

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Rule 36.1 of the Rules of this Court, the Baptist Joint Committee on Public Affairs files this brief in support of the petition for a writ of certiorari in the above captioned case. Consent for the filing of this brief has been obtained in writing from the attorneys of record for the parties in this

case. Their original letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The Baptist Joint

Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. We believe that the principle of religious liberty as it is embodied in the First Amendment to the Constitution of the United States is at risk in the case at bar.

REASONS FOR GRANTING THE WRIT

Amicus urges that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted. The court below has decided an important and novel question of federal law in a manner that is inconsistent with the decisions of this Court.

I.

THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISIONS INVOLVING ARTICLE III STANDING AND CASTS DOUBT ON THE ABILITY OF INJURED RELIGIOUS ORGANIZATIONS TO SEEK ENFORCEMENT OF THE MOST FUNDAMENTAL GUARANTEES OF THE FIRST AMENDMENT.

Article III requirements of standing are not satisfied by the abstract or generalized injuries suffered by all citizens as a result of alleged constitutional violations. Similarly, standing does not exist where injuries are speculative in nature. A litigant has no standing to complain about constitutional violations apart from an injury in fact that distinguishes him from the general public. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982); Schlesinger v. Reservists Committee To Stop the War, 418 U.S. 208

(1974); Flast v. Cohen, 392 U.S. 83 (1968).

Petitioners' complaint is not a generalized citizens' complaint. The injuries alleged are peculiar to Petitioners and are easily distinguished from those suffered by the public at large. Likewise, Petitioners' injuries are not speculative. To the contrary, they are "distinct and palpable" so as to satisfy any reasonable application of the doctrine of standing. See Warth v. Seldin, 422 U.S. 490, 501 (1975).

As a direct and proximate result of Respondents' actions, the petitioning churches and religious organizations have been made objects of official governmental discrimination. They, unlike the Roman Catholic Church, will not have the benefit of diplomatic access to the President of the United States of America.

Additional benefits conferred upon the Roman Catholic Church that are not enjoyed by Petitioners include:

1. free transmittal of church correspondence at taxpayers' expense [First Amended Complaint ¶83(e)],

2. free transportation at taxpayers' expense [Ibid. at ¶83(d)],

3. direct governmental assistance to various church organizations [Ibid. at ¶83(g)], and

4. privileges and protections set forth in 22 U.S.C. §§254a et seq. and the Vienna Convention on Diplomatic Relations (April 18, 1961, 23 U.S.T. 3227, T.I.A.S. numbered 7502) [Complaint ¶89(e)].

By creating formal diplomatic relations with the Holy See, the United States government necessarily communicates that the Roman Catholic Church is to be preferred and that all other

religious organizations somehow are inferior. This preferential treatment of one church and the implicit discrimination against all others is perhaps the most obvious form of injury that could be suffered by a religious organization. It is shocking to imagine that the individuals and organizations who are the objects of this overt act of governmental discrimination do not have standing to challenge this illegal exercise of power. Petitioners have a "concrete interest" in seeing that they receive fair and equal treatment by the United States government as guaranteed by the First Amendment, and the Court should insure that this interest can be protected by providing Petitioners with access to the federal courts. See Allen v. Wright, ____ U.S. ____, 104 S.Ct. 3315, 3328 (1984).

The Court has expressly recognized that when individuals or organizations

are "personally denied equal treatment by the challenged discriminatory conduct," their stigmatic injury is sufficient grounds for Article III standing. Allen, supra, at 3327-28. Clearly, Petitioners have been stigmatized by the President's discriminatory conduct and cast in an inferior light. The Roman Catholic Church is now perceived as having more clout and influence in the United States because of its unique and favored relationship with the President. Conversely, the general public views Petitioners as being "less significant" members of the religious community. First Amended Complaint ¶95(c). Having been personally denied equal treatment, Petitioners should not be denied access to the federal courts to seek redress for their stigmatic injuries.

Unlike Allen v. Wright, supra, the relief sought in this case will correct

immediately the ongoing injury to Petitioners caused by the President's actions. Because Petitioners have fulfilled the causation requirement of Allen and the injury in fact requirement of Flast and its progeny, there is nothing in the decisions of the Court that necessitates the dismissal of this case for reasons of standing.

II.

THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISIONS CONCERNING THE POWERS OF THE PRESIDENT PURSUANT TO ARTICLE II AND MISAPPLIES THE "POLITICAL QUESTION" DOCTRINE SO AS TO ABSOLVE THE PRESIDENT OF HIS LEGAL OBLIGATION TO ACT IN ACCORDANCE WITH THE CONSTITUTION.

The court below held that even if Petitioners had standing to sue, their action must be dismissed because it addresses a non-justiciable political issue. The court's decision is premised on the fact that Article II gives the

President sole authority in the conduct of foreign affairs. Therefore, the court opined, his appointment of an ambassador to the Holy See is not subject to question. This misapplication of the "political question" doctrine is in conflict with the Court's decisions and has the effect of absolving the President of his legal obligation to act in accordance with the Constitution.

A. THE PRESIDENT IS SUBJECT TO THE RESTRICTIONS OF THE CONSTITUTION EVEN IN THE CONDUCT OF FOREIGN AFFAIRS.

As noted, the President has virtually exclusive power to conduct foreign affairs. United States Constitution, Article II, §§2 and 3; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); U.S. v. Pink, 315 U.S. 203 (1942). This includes the power to appoint ambassadors subject to the advice and consent of the Senate. However, the President's power is not unlimited. He does not have the

power to violate the First Amendment by appointing an ambassador to a church. The First Amendment amends the entire Constitution and, thus, supersedes and limits the powers conferred upon the President by Article II.

The precise question of the constitutional constraints upon the President's power to appoint ambassadors is sui generis. However, in similar cases involving the President's exclusive power to make treaties, the Court has made it clear that the President must exercise his power in a manner consistent with all other provisions of the Constitution. Reid v. Covert, 354 U.S. 1 (1957); De Geofroy v. Riggs, 133 U.S. 258 (1890). Moreover, the Court has stated, "It is error to suppose that every case or controversy which touches foreign relations lies beyond the judicial cognizance." Baker v. Carr, 369 U.S. 186, 211 (1962).

Other federal courts also have held that the President is subject to the restrictions of the Constitution even in the conduct of foreign affairs. Olegario v. U.S., 629 F.2d 204 (2nd Cir. 1980); U.S. v. Butenko, 494 F.2d 593 (3rd Cir. 1974).

Federal courts simply cannot reject "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases . . . reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." Baker, supra, at 217.

In short, it is the responsibility of the Court to see that the Constitution is upheld and that even the President abides by its commands. See U.S. v. Nixon, 418 U.S. 683 (1974). "It is emphatically the

province and duty of the judicial department to say what the law is." Nixon, supra, at 703, quoting Marbury v. Madison, 1 Cranch. 137, 177, 2 L.Ed. 60 (1803).

B. THE APPOINTMENT OF AN AMBASSADOR TO A CHURCH IS STRICTLY FORBIDDEN BY THE CONSTITUTION.

1. First Amendment

Perhaps the most fundamental guarantee of the establishment clause of the First Amendment is that government cannot act in a way that prefers one religion over another. Everson v. Board of Education, 330 U.S. 1 (1947). The constitutional mandate of uniform and equal treatment for all religious groups recently has been reaffirmed by the Court in Larson v. Valente, 456 U.S. 228 (1982). The President's appointment of an ambassador to the Holy See is a blatant violation of this constitutional principle of impartiality.

Any government action granting denominational preferences is inherently suspect and subject to strict scrutiny. Larson, supra. Accordingly, official acts preferring one religious organization over another are prohibited unless they are necessary to accomplish a compelling state interest. Even then the acts must be "closely fitted" to the accomplishment of the state's interest. Larson, supra, at 247. Stated differently, if the state can accomplish its interest without conferring preferential treatment upon a religious organization, it must do so.

The record is totally devoid of proof of a compelling state interest that would justify the appointment of an ambassador to the Holy See. Assuming arguendo that such an interest existed, the government has failed to demonstrate that its

actions are closely fitted to furthering that interest.

2. Fifth Amendment

Respondents' actions also constitute a violation of the equal protection component of the due process clause of the Fifth Amendment. See NLRB v. Sumter Plywood Corporation, 535 F.2d 917 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977); U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973).

The essence of equal protection is fairness. Equal protection requires that all individuals or organizations similarly situated be treated alike. City of Cleburne, TX v. Cleburne Living Center, _____ U.S. _____, 105 S.Ct. 3249 (1985).

Where a challenged government action affects the exercise of a fundamental right, the proper equal protection

analysis is one of strict scrutiny. San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973). The Court has explicitly held that rights guaranteed by the First Amendment, such as those asserted by Petitioners, are fundamental and, therefore, give rise to strict scrutiny. Williams v. Rhodes, 393 U.S. 23 (1968). Respondents' actions cannot pass constitutional muster under this elevated level of scrutiny.

C. FOR PURPOSES OF RESPONDENTS' MOTION TO DISMISS, PETITIONERS' ALLEGATION THAT THE HOLY SEE IS A "CHURCH" MUST BE ACCEPTED AS TRUE UNLESS THERE IS NO FACTUAL BASIS FOR THIS ASSERTION.

Petitioners' constitutional arguments are based upon their factual assertion that the Holy See is first and foremost a church, and its sovereignty over 108 acres of land in central Italy is incidental to this fact. Petitioners' First Amended Complaint sets forth the unequivocal statement of Archbishop Pio Laghi,

the Apostolic Pro-Nuncio to the United States, in which he flatly contradicts Respondents' assertion that the United States has established diplomatic relations with the Vatican City-State. Archbishop Laghi's statement makes it clear that the diplomatic exchange is with the Roman Catholic Church and not with a civil state.

> [T]he Catholic Church is the only religious body that I know of that engages in direct relations with various states. You recall the confusion and controversy that arose in the media at the time it was announced that the United States and the Holy See intended to re-establish diplomatic ties. Some mistakenly tried to justify the American government's action by implying that it was entering into a diplomatic relationship not with the Roman

> Catholic Church as such, the Holy See, but rather with the sovereign Vatican City-State. First Amended Complaint ¶78. (emphasis added).

The Archbishop's statement is supported by numerous other allegations in the Complaint.

Respondents maintain that, notwithstanding Petitioners' allegations to the contrary, the President's characterization of the Holy See as a civil state rather than a church is conclusive because of his exclusive authority in the conduct of foreign affairs. Again, Respondents are mistaken.

As set forth above, the President's authority in the conduct of foreign affairs is by no means absolute. He like all other government officials is subject to the limitations of the Constitution. Similarly, the Court is not required to "look the other way" when his

characterization of an issue concerning foreign affairs is patently erroneous.

The Holy See has proclaimed publicly that it is a church and that any foreign ambassadors received by the Vatican will be ambassadors to the Roman Catholic Church. The Holy See's own characterization of itself should not be set aside merely because the President thinks otherwise. Allowing the President to define conclusively the nature of the Holy See in contradiction of its own statements to the contrary goes beyond the constitutional separation of powers and confers upon the President unfettered authority that is not intended by the Constitution.

The sole issue under a Rule 12(b)(6) motion to dismiss is whether it appears to a certainty that under the facts alleged in the complaint the plaintiff is not entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ware v.

Travelers Insurance Company, 150 F.2d 463 (9th Cir. 1945). If there is any possible basis under the pleadings for relief, the motion should not be granted. Kochlacs v. Local Board No. 92, 476 F.2d 557 (7th Cir. 1973). Clearly, Petitioners have pled a legally cognizable cause of action, and, therefore, their Complaint should not be dismissed.

CONCLUSION

For the foregoing reasons, Amicus urges that the petition for writ of certiorari filed in this cause be granted.

Respectfully submitted,

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OCTOBER TERM, 1986

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RONALD W. REAGAN, as President of the
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Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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OCTOBER TERM, 1986

No. 86-113

AMERICAN BAPTIST CHURCHES IN THE U.S.A., *et al.*,
Petitioners,

v.

RONALD W. REAGAN, as President of the
United States of America, *et al.*,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives of the organization include taking action to eliminate religious discrimination and to uphold traditional concepts of church-state separation.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs and who promote the concept of free exercise of religion and the concept that government should not respect any establishment of religion.

SUMMARY OF ARGUMENT

The Papal Representative to the United States clearly has stated that the Holy See is a religious, not political, entity. The lower courts in this case, however, have declared the United States Government can disregard both the Holy See's characterization of itself and this Court's traditional holdings that the Religion Clauses of the First Amendment require Government neutrality when dealing with churches. To conclude that the President stands above the demands of the Establishment Clause and that aggrieved denominations have no standing to press their First Amendment rights is to repudiate in effect a key principle of our Constitution.

ARGUMENT

THE PRESIDENT'S ARTICLE II POWERS SHOULD NOT BE ABOVE JUDICIAL REVIEW WHEN THEY ALLEGEDLY VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Council on Religious Freedom vigorously opposes the decisions of the lower federal courts in this case that the President's conduct of foreign policy transcends values embodied in the Bill of Rights and that religious denominations and clergy have no standing to challenge diplomatic recognition by the United States government of a religious denomination.

The evidence is this case about the nature of the Holy See is beyond question. The representative of the Holy

See itself has set the record straight. Archbishop Pio Laghi, Apostolic Pro-Nuncio in the United States, made the following points in his address at The Catholic University of America on April 6, 1984, where he was awarded an honorary degree "as the Pope's personal representative":

> Papal Diplomacy has been referred to as *sui generis*, because nowhere is it exactly paralleled. In fact, the Catholic Church is the only religious body that I know of that engages in direct relations with various states. You recall the confusion and controversy that arose in the media at the time it was announced that the United States and the Holy See intended to re-establish diplomatic ties. Some mistakenly tried to justify the American government's action by implying that it was entering into a diplomatic relationship not with the Roman Catholic Church as such, the Holy See, but rather with the sovereign Vatican City-State.

Petitioner's Appendix at 72a (hereinafter called Appendix).

The Apostolic Pro-Nuncio continued by noting that "the Pope's religious authority . . . confers upon him the classical right of legation, a diplomatic standing in the world. Those who interpret Papal Diplomacy as emanating from the Pope's temporal sovereignty are failing to understand the true nature of the mission of the Holy See." *Ibid.*

The Apostolic Pro-Nuncia then quoted Monsignor Montini's discourse entitled, "Papal Diplomacy As a Means of Representing Christ Before the World": "'You must all know what it means to be representatives. Diplomacy means representation. Let us know what it means to represent Christ, and to represent the Church." Appendix at 73a. Monsignor Montini, of course, later became Pope Paul VI.

The Apostolic Pro-Nuncio also quoted the late Archbishop Cardinale, former Papal Representative to Belgium, for the proposition that the Holy See entrusts its diplomatic representatives with a mission that is "at once religious, political and social." *Id.*, at 75a.

The Apostolic Pro-Nuncio explained why Papal Representatives are not called ambassadors: "Unlike representatives from other nations of the world, the Holy See prefers to use the term, *Nuncio*, which derives from the Latin *nuntius*. We exercise the role of messengers, heralds of the Good News. . . ." *Id.* When capitalized, "Good News," of course, is a traditional Christian phrase referring to preaching the Biblical concept that Jesus is Lord of all:

> But how are men to call upon him in whom they have not believed? And how are they to believe in him of whom they have never heard? And how are they to hear without a preacher? And how can men preach unless they are sent? As it is written, "How beautiful are the feet of those who preach good news!"

Romans 10:14-15 (Revised Standard Version).

The Apostolic Pro-Nuncio also quoted Pope Paul VI on the role of modern Papal Representatives:

> Today, the Nuncio must place a more pronounced pastoral accent on his work. He too is at the service of the Kingdom of God as it goes forward in the land. . . . You, the Representatives of the Pope, must be for the local hierarchies a living sign of collegiality, sharing as far as you can their pastoral preoccupations. Coming from the heart of Christianity, you are the witnesses of the catholicity, that is, the universality of the Christian message. Sharing as you do in the special charism of Peter, you represent in a privileged way the demands of unity in the desired diversity of expressions of the same face.

Appendix at 76a. The Apostolic Pro-Nuncio affirmed that his experience overwhelmingly involves pastoral work, not diplomacy: "As a matter of fact, I can tell you that the reality shapes up precisely that way. I spend most of my time dealing with issues that are distinctly religious in nature, and only a small portion of my day is taken up by matters that pertain to my diplomatic position with the United States Government." *Ibid.*

The Apostolic Pro-Nuncio concluded by saying that the "Holy See believes that it finds itself in a unique position of spiritual and moral authority in the service of peace for all." *Id.*, at 78a. He thanked The Catholic University for the honorary degree, accepting it not as recognition of his personal accomplishments "but of the achievements of the Holy See and of the Vicar of Christ himself." *Id.* at 78a-79a.

In summary, the Apostolic Pro-Nuncio has proclaimed that diplomatic recognition of the Holy See is recognition of the Roman Catholic Church as such as not of some European mini-state called the Vatican City. It's the Pope's religious and spiritual authority that confers on him the right of legation. Any other concept fails to understand the true mission of the Holy See. And Papal Representatives are representatives of Christ, nuncios, bearers of the Good News, Christian pastors who have embarked on missions that are "at once" religious, political, and social.

Even though the Apostolic Pro-Nuncio has clearly defined the role of the Holy See as religious and its representatives messengers of Christ, the District Court in this case has declared the Holy See's view as really not important. Concluded the District Court:

> Every one of plaintiffs' contentions in this litigation is based upon the premise that "the Vatican" or the

> "Holy See," with which the exchange of ambassadors has occurred, is essentially a church rather than a state, or, at least, that it is a church-state whose churchly attributes far outweigh its secular attributes. The record provides considerable support for the proposition that the Vatican/Holy See views itself in that light. But this does not mean, of course, that the government of the United States is obliged to regard the Vatican/Holy See as primarily a church rather than a state. Whatever the correct analysis, the authority to conduct it rests with the Executive Branch, not this court.

Id, at 27a.

In the view of the Council on Religious Freedom, the District Court in one short paragraph chose to ignore the facts as clearly explained by the Papal Representative to the United States and declared that in matters of foreign relations the Executive Branch is above the demands of the Bill of Rights and that the Court of Appeals erred in affirming the District Court's decision. To conclude that the President stands above the demands of the Establishment Clause of the First Amendment to the Constitution and that aggrieved denominations and their clergy have no standing to press their First Amendment rights is in effect to repudiate a key principle of our Constitution and our republican form of government.

This Court has insisted—and rightly so—that government must be evenhanded in its dealing with churches.

In *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), this Court said government must "be neutral in its relations" with churches.

In *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952), this Court proclaimed "government must be neutral when it comes to competition between sects."

In *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968), this Court said, "The First Amendment mandates governmental neutrality between religion and religion."

In *Gillette* v. *United States*, 401 U.S. 437, 449-450 (1971), this Court added, "An attack founded on disparate treatment of 'religious' claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion. . . ."

In *Larson* v. *Valente*, 456 U.S. 228, 244-245 (1982), this Court said, "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. . . . This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."

By diplomatically recognizing the Holy See, the Executive Branch of the United States Government has officially preferred one religion over another. Diplomatic recognition permits the favored church to extend its influence and power from a status that no other church has or, apparently, can ever expect to have. This special acknowledgment of one church thus puts it on a vantage ground no other church can match. This is precisely the kind of unequal treatment the Establishment Clause of the First Amendment, as this Court has so often indicated, was designed to prevent.

CONCLUSION

For the reasons stated above, the Council on Religious Freedom urges this Court to help conserve religious freedom by granting the Petition for Writ of Certiorari in this case. Otherwise an Establishment Clause concept will

have been rewritten in these words: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another—except when the Executive Branch deals with political questions involving foreign policy."

Respectfully submitted this 22nd day of August, 1986.

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